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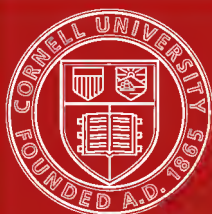


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# THE STATE RESERVATION AT NIAGARA

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## A HISTORY

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By CHARLES M. DOW, LL. D.

Commissioner State Reservation at Niagara  
1898-1914

President of the Commission  
1903-1914

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**DEDICATED  
TO THE  
COMMISSIONERS  
OF THE  
STATE RESERVATION AT NIAGARA  
Both Past and Present  
With Whom I Have Been Associated**



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## A WORD OF INTRODUCTION

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The history of the State Reservation at Niagara is recited in these pages by a man who has for fifteen years given his great ability, much of his time, and his extended influence to the work of opening to the whole world under agreeable conditions and without the sordid influence of commercialism, the stupendous natural wonder of Niagara Falls. The author has been for a decade the President of the Commissioners of the State Reservation at Niagara, and he was intimately associated with the movement to create and beautify the Park from its inception. No other man in the State is more completely informed as to the gradual, and at times most discouraging, progress of the work which has resulted in the beautiful and admirably administered Park which exists at Niagara Falls today, and it was in accordance with the earnest desire of his fellow Commissioners that he has undertaken and completed the record which is contained in this volume. For this, as for a vast amount of other voluntary service to the people, extending through many years, Mr. Dow finds his reward in the consciousness of service and in the grateful appreciation of those who have the honor of his acquaintance and friendship. Among these, with the other members of the Niagara Commission, I am most glad to be numbered.

WILLIAM B. HOWLAND.

*January 1, 1914.*



# A HISTORY

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## CHAPTER I

### THE HISTORY OF THE ESTABLISHMENT OF THE STATE RESERVATION AT NIAGARA

There have been many claimants for the honor of first suggesting the devotion of the scenery about Niagara Falls to the free use of the public. So far as is known, however, the idea seems to have occurred first to two Scotch divines, the Reverends Andrew Reed and Thomas Mattheson, who stopped at Niagara during a visit made to the Presbyterian churches of America in 1834. "Niagara," they say in their account of their travels,

"does not belong to Canada or America. Such spots should be deemed the property of civilized mankind; and nothing should be allowed to weaken their efficacy on the tastes, the morals and the enjoyment of all mankind." <sup>1</sup>

The same sentiment has been voiced by various other visitors since their time, notably by Henry James. Writing of Goat Island in 1871, he said:

" . . . why should not the State buy up the precious acres? It is the opinion of a sentimental tourist that no price would be too great to pay." <sup>2</sup>

Most prominent probably among those for whom the origination of the park idea has been claimed is Earl

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<sup>1</sup> *Visit to the American Churches*, New York, 1835, Vol. I, p. 93.

<sup>2</sup> *Portraits of Places*, Boston, 1884, p. 372.

Dufferin, the governor-general of Canada from 1872 to 1878. Though the honor of first suggesting the reservation of the scenery about the Falls has been widely conceded to him, there would seem to be no actual warrant for so doing. The most that can be said in his behalf is that he first gave official and public utterance to the subject. This was in the fall of 1878.<sup>3</sup> The matter seems, however, to have been often referred to in private conversation, if not in the public press, before this.<sup>4</sup> It is quite certain that, whatever may have been the origin of the park idea, the beginnings of the effective movement which culminated in the establishment of the existing reservations are American and go back at least as far as 1869.

The matter has been so much disputed that it may not be amiss to quote the evidence for the American origin of the park idea rather fully. The material is to be found among the papers given by Thomas V. Welch, himself an indefatigable worker in the reservation movement and the first superintendent of the New York State Reservation, to the Niagara Frontier Historical Society of Niagara Falls, New York. It consists of extracts from letters written to Mr. Welch by Frederick Law Olmsted, the landscape architect, and Frederick E. Church, the artist, on this very subject of the origin of the reservation idea. We quote first from Mr. Olmsted's letter written to Mr. Welch on May 28, 1888. Says Mr. Olmsted:

"While rambling on Goat Island with Mr. Dorsheimer and Mr. Richardson I brought the sub-

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<sup>3</sup> In an address made to the Society of Artists at its meeting in Toronto, September 26, 1878. *Infra*, p. 13. Lord Dufferin seems to have called the attention of the Ontario Legislature to the matter at about the same time. *Infra*, p. 15.

<sup>4</sup> The *Niagara Falls Gazette*, January 15, 1879, commenting editorially on the international park project, says: "It is no new project. It has been urged by some of the best men in New York and elsewhere years ago, or since so much complaint has been made."



ject before them . . . the same gentlemen met afterwards, together with one or two others at the Buffalo Club House and the matter was further discussed . . . I cannot fix the date but have an impression that it was September 1869. It can be determined by finding when Mr. Dorsheimer,<sup>5</sup> Mr. Richardson<sup>6</sup> and I were registered on the book of the Cataract House. My partner, Mr. Vaux,<sup>7</sup> joined me, I believe, the day after the meeting and the entry of his name will further establish the date . . . ”

Examination of the Cataract House register establishes the fact that the meeting in question must have taken place on August 7, 1869.<sup>8</sup>

How the matter was suggested to Mr. Olmsted appears from that gentleman's own account as given in his "notes" made for the Commissioners of the State Survey in 1879. Says Mr. Olmsted:

"I have myself been an occasional visitor at Niagara for forty-five years. My attention was first called to the rapidly approaching ruin of its characteristic scenery by Mr. F. E. Church, about ten years ago. Shortly afterwards, several gentlemen, frequenters of the Falls, met at my request, to

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<sup>5</sup> William Dorsheimer, at this time district attorney for the northern district of New York, later Lieutenant-Governor and Congressman. He was a member of the State Survey in 1879 when the reservation project was reported to the Legislature. Upon the establishment of the reservation he was appointed a member of the board of commissioners and shortly became president of it, serving until his death in 1888.

<sup>6</sup> Henry Hobson Richardson, the distinguished architect.

<sup>7</sup> Calvert Vaux, the landscape architect. In co-operation with Mr. Olmsted he later drew up for the commissioners of the State Reservation a "*General Plan for the Improvement of the Niagara Reservation.*"

<sup>8</sup> These registers are still at the Cataract House and are accessible to the public.

consider this danger, one of them being a member of the Commission now reporting on the subject.”<sup>9</sup>

For ten years the gentlemen above mentioned kept up a continuous agitation, drawing around them many congenial and helpful spirits. Finally recourse was had to Lord Dufferin, who in turn called the matter to the attention of Governor Robinson of New York. How Lord Dufferin happened to be appealed to is established in the “Church letter” referred to above.<sup>10</sup> We quote:

“. . . A long time has elapsed since the idea occurred to me that Niagara Falls should be reserved as a Park.

“I kept the matter to myself for two or three years, as I wished to revisit and study that locality with reference to such a disposition of it. I was the more anxious to do this as the natural formation of the rocks seemed to invite some artistic treatment especially by cutting channels for the purpose of forming picturesque cascades which would not only greatly enrich and diversify certain portions but also do much toward harmonizing the general effect.

“The importance of having the co-operation of Canada finally determined me to take advantage of the kind services of William H. Hurlbut, Esq., then editor of the *New York World* and a friend of Lord Dufferin, who wrote him on the subject. I opened the matter to several of my friends who received it with so much enthusiasm that I was glad to leave it in their hands for such action as they deemed advisable, but no publicity was given until Lord Dufferin alluded to it in a speech.”

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<sup>9</sup> Report of the State Survey, 1879, p. 27.

<sup>10</sup> *Supra*, p. 11.

This letter taken with the "Olmsted letter" quoted above<sup>11</sup> would seem to furnish incontestable evidence of the American origin of the New York State reservation movement and dispose finally of claims made for Earl Dufferin by his friends. It is true that in the summer of 1878, in the course of a casual meeting with Governor Robinson of New York, he suggested the international park idea to the latter and later called public attention to the desirability of preserving the scenery of the Falls in an address delivered to the Society of Artists at its meeting in Toronto in September, 1878. As pointed out above,<sup>12</sup> this was the first public utterance on the subject. The remarks made are interesting enough to quote in full:

"And now, Gentlemen," said Lord Dufferin, "before I sit down, there is another topic to which I would for a moment refer. I am about to confide to you a mission which I think sufficiently connected with your prosperity to justify me in asking your assistance. In your neighborhood there exists, as you are aware, one of the most wondrous, beautiful and stupendous scenes which the forces of nature have ever constructed. Indeed, so majestic is the subject, that though many skilled hands have endeavored to transfer it to canvas, few have succeeded in adequately depicting its awe-inspiring characteristics. I allude, of course, to the Falls of Niagara. But I am sure that everyone will agree with me in thinking that the pleasure he may have derived from his pilgrimage to so famous a spot, whether as an artist or as a simple tourist, has been miserably marred and defeated by the inconvenience and annoyance he has experienced at the hands of the various squatting interests that have taken possession of every point of

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<sup>11</sup> *Supra*, p. 11.

<sup>12</sup> *Supra*, p. 10.

vantage at the Falls; who tax the pockets and irritate the nerves of the visitor, and by whom, just at the moment when he is about to give his whole being up to the contemplation of the scene before him, as he is about to give his whole being to feel the inspiration of the natural beauties around him, his imagination and his poetic faculties are suddenly shocked and disorganized by a demand for ten cents.

"Some few weeks ago I had the good fortune to meet his Excellency the Governor of the State of New York, and I then suggested to him the idea which has been long present to my mind that the governments of New York and Ontario and Canada should combine to acquire whatever rights may have been established against the public and to form around the Falls a small public International Park, not indeed decorative or in any way sophisticated by the penny arts of the landscape gardner, but carefully preserved in the picturesque condition in which it was originally laid out by the hand of nature."<sup>13</sup>

Governor Robinson heartily approved of the idea and advocated it in his message to the Legislature in 1879. We quote:

"The civil jurisdiction over the Falls of Niagara, as well as the shores and waters of Niagara river, is divided between the State and the Province of Ontario, Canada. But in one sense the sublime exhibition of natural powers there witnessed is the property of the whole world. It is visited by tourists from all quarters of the globe, and it would seem to be incumbent upon both governments to protect such travelers from annoyance on either side. It

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<sup>13</sup> Annual Reports of the Commissioners of the State Reservation, XIX, pp. 21-22.

is, however, well known, and a matter of universal complaint, that the most favorable points of observation around the Falls are appropriated for purposes of private profit, while the shores swarm with sharpers, hucksters and peddlers who perpetually harass all visitors. In the course of the last summer, in a casual meeting and conversation with Lord Dufferin, the Governor-General of Canada, he suggested the propriety of some steps on the part of the State of New York and the Province of Ontario to remedy these abuses which he had seen and deeply regretted. His proposition was that a sort of International Park should be established, enclosing a suitable space on each side of the river, from which all the annoyances and vexations referred to should be excluded. Contemplating no attempt at landscape ornamenting in the vain hope of adding to the natural attractions of the Falls, he thought that each government might obtain control of a sufficient area to be kept sacred for the free use of those who, coming there from all parts of the world, desire to view the grand scenery without molestation. He believed that all this could be accomplished at small expense, each government of course retaining jurisdiction of its own proportion of such park, but with a mutual understanding as to the general regulations to be enforced on either side.

“Subsequently, the Governor-General called the attention of the government of Ontario to the same matter and recommended co-operation with the State of New York in accomplishing the purpose in view. The proper course, if such a plan were deemed advisable, would undoubtedly be the appointment of commissions by both governments to confer together as to its details. Should such a commission be appointed by the authorities of Ontario, I recommend

that you provide for the appointment of a similar one to consider the subject. There can be no doubt that many persons abstain from visiting the Falls in consequence of the annoyances referred to, nor can there be any reasonable doubt that the removal of these objections would largely increase the number of visitors annually." <sup>14</sup>

As we have said, Lord Dufferin first drew public attention to the reservation idea and he did undoubtedly discuss the subject with Governor Robinson. It is just possible, however, that Governor Robinson's alacrity in referring the matter to the Legislature may have been due to influences nearer at home. At any rate, there is among the "Welch papers" already referred to <sup>15</sup> a letter written to Mr. Welch by one Robert Fulton, which intimates that it was Samuel J. Tilden <sup>16</sup> who suggested legislative action on the park project to Governor Robinson. The letter suggests some interesting possibilities.

But to sum up the evidence thus far adduced: It would appear that while the idea of setting aside the territory immediately about the Falls probably occurred to various persons, the credit of actually inaugurating the reservation movement belongs to Messrs. Church, Olmsted, Dorsheimer and Richardson. Lord Dufferin started the ball rolling on its public course and brought the project to the attention of the Ontario government, while Governor Robinson made the first official utterance on the American side.

To go back to Governor Robinson's message: The Legislature at once took action, passing a joint resolution

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<sup>14</sup> Ibid., p. 23-24.

<sup>15</sup> *Supra*, p. 10.

<sup>16</sup> Governor Tilden was a close personal friend and the law partner of Andrew H. Green, who was for twenty years a member of the Niagara Commission.

instructing the Commissioners of the State Survey to consider and report what, if any, measures it might be expedient for the State to adopt for carrying out the governor's suggestion. At the request of the Commissioners, Mr. James T. Gardner, at that time the Director of the State Survey, and Mr. Frederick Law Olmsted examined the property about the Falls and drew up a plan of improvement. On the basis of this investigation and plan the Commissioners, on March 22, 1880, transmitted to the Legislature a special report on the preservation of the scenery of Niagara Falls. The report in question is of the greatest interest and value, not only because it carefully and elaborately reviewed the arguments for State control, but because it was the basis of the legislation which created the Reservation.<sup>17</sup>

The report commented at special length on the transient character of the visiting population at Niagara, attributing it chiefly to the constant annoyance to which the traveler was subjected. It was pointed out that while it was true that such annoyances were felt wherever tourists were gathered in large numbers, yet the inconvenience was greater at Niagara because the distinctive attractions there were concentrated within a comparatively limited area. Moreover, the enjoyment of travelers was marred more here than elsewhere because Niagara appealed so strongly to the higher emotional and imaginative faculties that whatever prevented or interrupted a contemplative and receptive frame of mind caused deeper irritation than would be caused elsewhere. The Commissioners gave it as their opinion that the annoyance in question could be removed only by the abolition of the fees and tolls then exacted and the exclusion of all business traffic from within the limits affording the chief views

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<sup>17</sup> Annual Reports of the Commissioners of the State Reservation, XIX, pp. 24-26.

of the Falls. The only prospect of such relief was, of course, in State control.

But not only were visitors being driven away from the Falls. The Commissioners reported further that the rapid destruction of the forests which had once lined the shores of the river and the erection of mills and factories were producing most injurious effects. They argued that the distinctive character of the Falls entitled them to preservation and recommended the acquisition by the State of as much land as was absolutely necessary for the protection of the characteristic scenery of the Falls, to be held in trust forever for the people of the State. They suggested that all unnecessary landscape gardening and formal ornamentation be sedulously avoided and that natural conditions be restored as far as possible and maintained.<sup>18</sup>

The report of the Commissioners was re-inforced by a remarkable public memorial addressed to the governor of New York and the governor-general of Canada. The reasons for reserving the scenery about the Falls were set forth at length. To quote:

“The Falls of Niagara are peculiarly exposed to disastrous injury. The heights of snow, the precipitous crags of great mountains, however they may be disfigured by men, can rarely be applied to uses which would destroy their sublimity. But should the islands and declivities of the Niagara river be stripped of their natural woods, and occupied for manufacturing purposes, should even the position, size and form of the constructions which the accommodation of visitors will call for, continue to be regulated solely by the pecuniary interests of numerous individual landowners, the loss to the world will be great and irreparable. The danger may be

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<sup>18</sup> Report of the New York State Survey, 1879, p. 12.



measured by what has already occurred. The river's banks are denuded of the noble forest by which they were originally covered; are degraded by incongruous and unworthy structures, made for advertising purposes, wilfully conspicuous and obstructive, and the visitor's attention is diverted from scenes to the influence of which he would gladly surrender himself, by demands for tolls and fees, and the offer of services most of which he would prefer to avoid.

"Objects of great natural beauty and grandeur are among the most valuable gifts which Providence has bestowed upon our race. The contemplation of them elevates and informs the human understanding. They are instruments of education. They conduce to the order of society. They draw together all races, and thus contribute to the union and peace of nations.

"The suggestion, therefore, that an object of this class so unparalleled as the Falls of Niagara should be placed under the joint guardianship of the two governments whose chief magistrates we have the honor to address, is a proper concern of the civilized world, and we respectfully ask that it may, by appropriate methods, be commended to the wise consideration of the Legislature of New York."<sup>19</sup>

Probably no document of a similar character ever bore a more distinguished list of signatures. Among the hundreds who signed it were the Vice-President of the United States, the Secretary of War, the Chief Justice and seven Associate Justices of the Supreme Court of the United States, members of the Canadian bench and Parliament, the leading lights of various English and American uni-

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<sup>19</sup> Annual Reports of the Commissioners of the State Reservation, XIX, pp. 26-34.

versities, the most prominent United States Senators and Representatives, officers of the American Navy, and eminent divines, litterateurs, poets, artists, statesmen, philanthropists, English and American. To mention only a few names, there were F. Max Muller, Sir John Lubbock, Thomas Carlyle, John Ruskin, Leslie Stephen, Ralph Waldo Emerson, Henry W. Longfellow, James Russell Lowell, John Greenleaf Whittier, Oliver Wendell Holmes, Francis Parkman, W. D. Howells, Asa Gray, Alexander Agassiz, Phillips Brooks.

It would seem as though such sentiment, expressed by such a body of petitioners, would have been regarded as almost mandatory upon the authorities at Albany, but, unfortunately, Governor Cornell did not regard the memorial with favor and, consequently, nothing could be done. So decided was the Governor's opposition that no serious attempt was made to secure the passage of a Niagara Reservation bill until 1882.<sup>20</sup>

Though the outlook was discouraging, those in favor of the reservation project were not idle. Seeing that nothing was to be gained from the Legislature, they gave their attention to a deliberate and carefully planned campaign of education by means of public addresses, pamphlets and newspaper articles. The principal newspapers represented the most progressive thought on the subject. They, therefore, readily threw open their columns to communications designed to forward the reservation movement. Thus it came about that Mr. Olmsted and Mr. Charles Eliot Norton of Harvard University were able, early in 1881, to arrange for the publication, in New York and Boston, of a series of descriptive letters, written from Niagara Falls, with a view to arousing public attention to the danger of the obliteration of the distinctive charms of Niagara scenery. In pursuance of these arrangements,

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<sup>20</sup> Thomas V. Welch, *How Niagara was Made Free*, p. 4.

the *New York Tribune*, the *New York Herald*, the *New York Evening Post*, and the *Boston Daily Advertiser*, in August and September of 1881, printed a series of such letters contributed by Mr. Henry Norman. The next summer the *Tribune*, *Post*, and *Advertiser* published eight similar letters written by Mr. J. B. Harrison. By means of these communications public opinion was effectively developed and moulded.<sup>21</sup>

The reservation movement took new life on the election of Governor Cleveland in November, 1882, for it was assumed that, inasmuch as he was a resident of the western part of the State, he would favor the preservation of the scenery at Niagara. To help matters along still further, a new scheme for arousing public sentiment was devised. The plan was the result of a conference of some of the leading spirits of the reservation movement held at the residence of Mr. Howard Potter, in New York City, on the evening of December 6, 1882, to consider means for the advancement of the Niagara movement.<sup>22</sup> Mr. Potter, ex-Lieutenant-Governor William Dorsheimer, and Messrs. J. B. Harrison, Frederick Law Olmsted, and Charles Eliot Norton were among those who spoke at this meeting. All favored an appeal directly to the public spirit of the people of the State in behalf of State ownership of the Falls. That no time might be lost the conference appointed Messrs. J. Hampden Robb, Francis H. Weeks, James T. Gardner, Buchanan Winthrop, and J. T. Van Rensselaer a committee with power to devise a plan.

On the evening of January 11, 1883, a second meeting was held at Municipal Hall, No. 67 Madison Avenue, New York, in response to invitations sent out by Mr. Potter and the committee. D. Willis James presided.

<sup>21</sup> These letters were later collected and published in pamphlet form.

<sup>22</sup> Welch, p. 4, also Annual Reports of the Commissioners of the State Reservation, XIX, pp. 35-37.

The committee recommended the formation of an association for the purpose of forwarding legislation and other measures designed for the restoration and preservation of the scenery at Niagara in accordance with the plan proposed by the Commissioners of the State Survey. A constitution was adopted and the following officers were elected: president, Howard Potter; vice-presidents, Daniel Huntington, George William Curtis, Cornelius Vanderbilt; secretary, Robert Lenox Belknap; treasurer, Charles Lanier; executive committee, J. Hampden Robb, Buchanan Winthrop, James T. Gardner, J. T. Van Rensselaer, Francis H. Weeks, Robert W. De Forest; corresponding secretary, Reverend J. B. Harrison.

The society, which was known as the Niagara Falls Association, grew rapidly in numbers and the reservation movement acquired great prestige under its initiative. Not only did it effectively co-ordinate individual effort, but, through its membership fees, it was able to supply at least a portion of the funds necessary to carry on the propaganda. It printed and freely circulated a great deal of literature. In addition, the secretary, Mr. Harrison, went from town to town, arousing local interest throughout the State by his public addresses and private appeals. In the course of the first year's activities, the following petition was sent out:

“The undersigned, citizens of the State of New York, feeling that in the possession of that greatest natural object of its kind, the Falls of Niagara, this State is trustee not only for its own citizens but for the nation and the world; believing that owing to the deflection of the river at the Falls and the character of the banks below, the whole industrial power of the Falls can be availed of without impairment of the natural beauties of the scenery; hearing with alarm of the rapid progress of disfigurements of it,

which threaten its speedy destruction, and protesting earnestly against the complete neglect in the past, by this great, wealthy and intelligent State of these considerations, and the rights of the citizens to the enjoyment of the gift of Nature, from which it results that there is not one foot of American soil from which our citizens can obtain, without payment, a sight of the Falls; and believing that the sublime spectacle of Niagara is one which every citizen should have the right to enjoy without money and without price; and feeling that the present state of things, which makes it a luxury beyond the reach of poverty amounts to a public wrong which ought no longer to go unredressed, do most earnestly petition your honorable body that the recommendations of the Commissioners of the State Survey, in their reports on the subject in 1879, may be speedily adopted and carried into effect by such legislation as may be necessary for that purpose.”<sup>23</sup>

What with correspondence, personal interviews, public meetings, newspaper articles, pamphlets, and popular petitions, by the time the Legislature met in 1883, the Niagara Falls Association felt confident that public opinion in the State at large and official opinion at Albany were sufficiently won to warrant a fresh attempt at legislation. A bill was, accordingly, drafted by the executive committee of the association and introduced in the Assembly early in 1883 by Jacob F. Miller, of New York.

The bill, of course, aroused the greatest interest. Among those who attended the hearings of the Ways and Means Committee to advocate the passage of the

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<sup>23</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 37.

measure were the Right Rev. William C. Doane, William Dorsheimer, J. Hampden Robb, and Howard Potter. Among those who spoke in favor of the bill before the Senate Finance Committee were Messrs. Dorsheimer, Robb, James T. Gardner, John Jay, and George William Curtis. The Legislature was stormed with petitions from all parts of the State. In addition, came letters from distinguished persons all over the Union, President Arthur, United States Senators Thomas C. Platt and Warner Miller, ex-Senator Roscoe Conkling, John Greenleaf Whittier, Oliver Wendell Holmes, William Dean Howells, President Andrew D. White of Cornell University, President Charles William Eliot of Harvard University, President Noah Porter of Yale University, ex-President Mark Hopkins of Williams College, not to mention others.<sup>24</sup>

After vigorous speeches in its behalf, the bill finally passed the Assembly on March 14, 1883, by a vote of 68 ayes to 39 nays. In the Senate, it was passed in concurrence April 18, by a vote of 21 to 10. On April 30, 1883, Governor Cleveland signed the bill and the "Act to authorize the selection, location, and appropriation of certain lands in the village of Niagara Falls for a State reservation and to preserve the scenery of the Falls of Niagara," became a law.<sup>25</sup>

Under the terms of the Act Governor Cleveland two days later appointed the first five Commissioners of the State Reservation at Niagara. They were ex-Lieutenant-Governor William Dorsheimer, of Buffalo; ex-Comptroller Andrew H. Green, of New York; J. Hampden Robb, of New York; Sherman S. Rogers, of Buffalo; and Martin B. Anderson, LL.D., of Rochester. The Commission organized at Albany, May 29, 1883, by

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<sup>24</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 38.

<sup>25</sup> Laws of New York, 1883, chap. 336.

electing Dr. Anderson president and Mr. Robb secretary and treasurer.<sup>26</sup>

In compliance with the provision of the act establishing the Commission it became the duty of the Commissioners to select and locate such lands as should, in their opinion, be needed to insure the preservation of the scenery of the Falls and its restoration to its natural condition, to prepare and file a map of the lands located by them, and to institute the appropriate legal proceedings to ascertain and determine the value of the lands so located and defined. To this end the Commissioners held their first meeting at Niagara Falls on June 9, 1883.

There was a great deal of discussion, as to how large the proposed reservation should be. It was suggested even at that time that its limit should be extended along the river to the Whirlpool. The desirability of the extension was, of course, obvious from an esthetic point of view. The Commissioners, however, did not deem it expedient to plan upon too large a scale, for as Commissioner Green pointed out: "The cost of the lands to be taken form an important element in deciding what lands be selected and located under the said act."<sup>27</sup> Men like Secretary Harrison of the Niagara Falls Association, who were closely in touch with public opinion on the subject, also felt that this enlargement of the proposed reservation and its cost, if seriously urged by the friends of the movement, would insure the defeat of the original enterprise.<sup>28</sup>

So strong was the feeling "in favor of confining the reservation and its expense within the narrowest limits consistent with the great object of the enterprise, the preservation of the essential portions of the scenery about

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<sup>26</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 45.

<sup>27</sup> Minute Books of the Commissioners, I, p. 7.

<sup>28</sup> *New York Sun*, August 6, 1883.

the Falls”<sup>29</sup> that the tract finally located was smaller than that recommended by the Commissioners of the State Survey. It was large enough, however, to make all points on the American side from which the Falls were visible public property and so preclude forever the possibility of commercializing any view of the Falls. We quote the resolution of the Commissioners describing the lands to be taken:

“*Resolved*, That in the judgment of this Board, it is desirable to settle and locate, as proper and necessary to be preserved for the purpose of preserving the scenery of the Falls of Niagara and restoring the scenery to its natural condition, the following lands situate in the village of Niagara and the county of Niagara, to wit: Goat Island, Bath (now Green) Island, the Three Sisters, Luna Island, Chapin Island, and the small islands adjacent to the said river between said islands and the mainland of the State of New York, and also the bed of said river between Goat Island and the Canadian boundary; also a strip of land beginning near Port Day in said village and running along the shore of said river, to and including Prospect Park and the cliff and debris slope under the same, substantially as shown by that part colored green on the map accompanying the fourth report of the Board of Commissioners of the State Survey, dated March 22, 1880; and including also at the east end of said strip sufficient land not exceeding one acre for purposes convenient to said reservation, and also including all lands at the foot of said Falls, and all lands in said river adjoining said islands and the other lands hereinbefore described.”<sup>30</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> Minute Books of the Commissioners, I, pp. 5-6.



In all there were about 412 acres, 300 of which were under water. On the mainland the territory just described extended in a great crescent-shaped bend along the northeastern shore of the river for a mile and a quarter and varied in width from a minimum of about four rods to a maximum of about forty-eight rods, its limits coinciding with a natural ridge within which were embraced all the points from which the Falls were visible.

The next step was to get a map of the lands selected. Thomas Evershed, at that time engineer of the western division, was assigned by the State Engineer and Surveyor to the task. The making of the survey was long and difficult work, but by October 27, 1883, the map was laid before the Commissioners and, on December 8, was approved and adopted by them.<sup>31</sup>

On January 26, 1884, the Commissioners, through their attorneys, Messrs. Allen, Movius, and Wilcox, of Buffalo, presented to the Supreme Court a petition for the appointment of the commissioners of appraisement required under the Act of 1883.<sup>32</sup> The Court named Messrs. Luther R. Marsh, of New York; Matthew Hale, of Albany; and Pascal P. Pratt, of Buffalo.

As may be imagined, the matter of appraising the lands in question was a very difficult one. In all there were about forty parcels of property held by some twenty-five different owners. The valuation process involved many sessions and the taking of a great volume of testimony. As might be expected, many extraordinary claims were made. Property owners who, up to this time, had cared so little for the river views from their premises as to effectually deprive themselves of such views by planting or maintaining trees, or, in some instances, building barns or stables upon the part of the lot commanding the

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<sup>31</sup> *Ibid.*, I, pp. 6, 13, 20, 21, 39-40.

<sup>32</sup> Laws of New York, 1883, chap. 336, § 3 ff.

finest views, suddenly attached extreme value to the river front.

The islands presented even greater difficulties than the mainland, for they were unique; there was no property like them from which to make comparison of market values. Goat Island and Prospect Park were by far the most valuable pieces of property proposed to be taken, even aside from their income, for they commanded the greatest variety of beautiful views of the Falls and Rapids, a fact of which the owners were not slow to make capital. Appeal was especially made to sentimental considerations. To quote from the opinion of the Commissioners of Appraisal:

“Counsel have been eloquent with reference to the beauties of Niagara Falls. They have spoken in fitting terms of the far-sounding roar of the cataract, the magnificence of the clouds of spray rising from its base, the rushing of the rapids, the splendor of the rainbows, and the general grandeur and beauty of the natural scenery visible from the islands and from Prospect Park. The tumultuous sound of the waters has been likened to the ‘voice of God’ and it was asserted that there was a certain dignity in the ownership of this property amounting almost to a patent of nobility; and for this it was claimed that due compensation should be made.

“Considerations of this kind can have very little weight with us. The question involved is not political, but eminently practical. The claimants, though they own the land under grants from the State of New York, have no title to the rushing waters; they do not own the pillars of spray that rise from the foot of the cataract, nor have they any title to the scene from Luna Island; we have held that they do not even own the bed of the river. The State

of New York never owned and could not grant the running water, the spray, or the rainbow, or roar of the cataract. These are not subject to human proprietorship; they are the gift of God to the human race, and no one claiming under a grant from the State of New York can arrogate to himself dignity or 'patent of nobility' by reason of such ownership. These wonders of nature confess no human authority or control. What the present claimants have obtained under the grant from the State is a legal right to exclude others from certain standpoints where they might view these impressive sights, and this right is subject to the power of the State, in the exercise of its prerogative of eminent domain, to resume possession of these lands, so as to restore to mankind the right freely, 'without money and without price,' to gaze upon these marvelous works of God. It is only for about three score years and ten, the limit of a single short human life, that the present proprietors or their ancestors have had any title to these lands. The wonders and beauties of the place were just as great for hundreds and thousands of years before the State of New York made its grants as they have been since. . . . For the supposed dignity of ownership we can certainly see no propriety in pecuniary reward."<sup>33</sup>

The most important question, however, which came up was that concerning the right of riparian owners to receive compensation for potential, but unused water power. The proprietors of the islands and riparian lots on the mainland claimed that they owned the bed of the river; and, independently of this, that they had the right to

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<sup>33</sup> This is from the opinion of the Commissioners, delivered September 20, 1884. In the manuscript collections of the Commissioners of the State Reservation at Niagara.

use without limit the power afforded by the Rapids and Falls. They claimed, therefore, that they should be compensated for the value of this vast water power, even where it had not been reduced to use. Upon this basis they were prepared to present claims aggregating at least thirty million dollars — an amount which, if just, would have rendered the cost of the proposed reservation prohibitive.

After a careful hearing and full argument of these claims, the Commissioners of Appraisal rejected all such claims except where the water power in question had actually been reduced to use and had been used long enough to create a prescriptive right. As to whether such prescriptive right could be acquired, they reserved decision. They held: (1) that the Niagara river was a public stream and consequently its bed and waters belonged to the State; (2) that as against the State, private riparian owners had no right to encroach upon its bed, to divert its waters, or to subject them to the burden of manufacturing uses, unless they had acquired such right from the State or by prescription.<sup>34</sup>

As pointed out by the attorneys of the Commissioners of the State Reservation:

“this result was an exceedingly fortunate one for the project of the State Reservation. The offers of the proprietors of Goat Island and Prospect Park to prove the value of their unused water power showed that their claims on this account alone would have aggregated at least thirty million dollars. Even to have gone into these questions at all would have consumed a vast amount of time and involved a very large expense for expert testimony. Under the decision of the Commissioners of Appraisement all

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<sup>34</sup> Annual Reports of the Commissioners of the State Reservation, I, p. 7.

such speculative testimony was absolutely rejected. The landowners were restricted to the value of their property for other than hydraulic purposes, except when the water power had been actually utilized, and in the latter class of cases were restricted to proving the value of such water power as they had actually used during a period equal to the time of prescription. This at once brought the case within more reasonable limits."<sup>35</sup>

Even after the exclusion of all claims for unused water power, the claims of the property owners amounted\* to about \$4,000,000. The final award, however, was \$1,433,429.50.

The report of award having been confirmed by the Supreme Court, the Commissioners of the State Reservation at Niagara submitted it to the Legislature in 1885 with a request for the appropriation of the amount named. Unfortunately, however, the bill prepared by the "reservationists" provided for the appropriation of the necessary amount out of any moneys in the treasury applicable for the purpose, a proposition that met with scant favor. A proposal that bonds be issued to supply the purchase money met no more cordial reception. In fact, it soon became apparent to watchful observers that the passage of a reservation act would require the active and earnest co-operation of all the friends of the reservation movement. A systematic agitation for the passage of the bill was accordingly commenced. In order to make as many persons as possible think and talk Niagara, J. B. Harrison, the secretary of the Niagara Falls Association, was sent throughout the State to bespeak the co-operation of editors, clergymen, and professional and business men

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<sup>35</sup> Report of the attorneys of the Commissioners of proceedings up to September 6, 1884. In the manuscript collection of the Commissioners of the State Reservation at Niagara.

generally. To the same end a citizens' committee was organized at Niagara Falls to co-operate with the Niagara Falls Association. In addition, addresses were made before the legislative committees, petitions circulated, pamphlets distributed, and newspapers filled with enthusiastic appeals. As a result of these activities the country was so aroused that the Legislature and State officers were deluged with letters, petitions, and telegrams.<sup>36</sup>

When the bill came up for a vote many who had intended to vote against it said that they had received letters and petitions from so many leading citizens of their districts asking them to support the bill, that, out of deference to the wishes of their constituents, they would vote for it. By dint of much persistent agitation a bill providing for a bond issue of \$1,000,000 finally passed the Assembly and, on April 30, 1885, received the signature of Governor Hill.<sup>37</sup>

On May 20, 1885, an act "to provide for the maintenance and management of the State Reservation at Niagara," enlarged the powers of the Commissioners so as to give them full control of the State's newly acquired property.<sup>38</sup>

The process of taking possession of the property which had been condemned was no slight task. Disputes of one sort or another hindered speedy settlement. Appeals taken from the awards for some time threatened serious trouble. Matters were further complicated by the fact that the issuance of bonds for the purpose of raising part of the purchase price, necessitated considerable delay in the payment of awards.

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<sup>36</sup> For a detailed account of the propaganda to secure the passage of the appropriation bill, see Thomas V. Welch, *How Niagara was Made Free*, p. 6 ff.

<sup>37</sup> Laws of New York, 1885, chap. 182.

<sup>38</sup> *Ibid.*, chap. 286.

Finally, however, all was settled, and on July 15, 1885, in the presence of a great assemblage of Canadians and Americans, the Reservation was formally dedicated and opened to the public. The Hon. Erastus Brooks presided and made the opening address. Prayer was offered by the Right Rev. A. Cleveland Coxe, the bishop of western New York. The completion of the proceedings for taking the land having been announced by Hon. William Dorsheimer, the president of the Commission, Governor Hill accepted the Reservation in the name of the State and declared it open to the public. An eloquent oration was delivered by Hon. James C. Carter and addresses were made by the Lieutenant-Governor of Ontario and other Canadian officials.

To review briefly the history thus far detailed. It is quite clear that there was first a period of more or less private agitation extending from that meeting of August 7, 1869, which has been described, to the summer of 1879 and culminating in Governor Robinson's message to the Legislature of New York. Next came a period of strenuous propaganda having in view the education of public opinion and the securing of appropriate legislation. Enough has been said to show that this educational campaign was an object lesson of its kind. The whole movement was very obviously well organized, and, backed as it was by men not only deeply and sincerely enthusiastic but skilled in political management and social psychology, it was bound to succeed. Though the reservation movement is interesting enough for its own sake, it becomes even more so when one stops to reflect upon the calibre of its leaders. It is doubtful whether any measure ever aroused an equal number of public men in all fields of endeavor. Certainly more disinterested service was never given in any cause. The reservation measures were absolutely untainted by corruption. The acts of April 30, 1883, and April 30, 1885, went through the Legislature

without the expenditure of a penny. The opening exercises of July 15, 1885, may be said to mark the beginning of a new era. The principle that the preservation of scenic beauty is not only a public purpose but a purpose warranting the expenditure of the public money was established.

It is interesting to inquire why there should have been this long hard struggle for sixteen years to get what was at once universally approved almost as soon as it had been established and what is now admitted to be correct in principle. The task of the "reservationists" was at bottom a double one. First, they had to overcome the general inertia of public sentiment. The salvation of Niagara had to be worked out as a new proposition and upon an entirely new principle, for the Niagara reservation movement was the first in the country for the purchase by a State of property for purely esthetic purposes. Not only had New York done nothing of the sort before, but it was without precedent in the United States that the right of eminent domain should be applied for the expropriation of private property and that public money should be used for the preservation of scenic beauty. It was naturally hard to convert many to the new doctrine of public proprietorship in natural beauty —

"the right of the people to enjoy, unmolested in person and unoffended in sight, the marvelous works of God as manifested in the exceptional natural scenery with which He has endowed the State of New York." <sup>39</sup>

To inertia was added misunderstanding of the scope and purpose of the movement. The cost of the undertaking was grossly exaggerated. There were many who regarded the movement as an entering wedge for a larger

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<sup>39</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 53.



scheme. Some were antagonized by the use of the term "International Park" in connection with the project. In the words of the nineteenth annual report of the Commissioners of the State Reservation,

"People whose conception of a 'park' was an area of land, laid out with neatly trimmed lawns, formal pathways, geometrical flower-beds, composition statuary and cast-iron benches, imagined that it was proposed to take a vast tract on both sides of the Niagara River, extending from far above the Falls to below the Whirlpool, and lay it out with conventional designs of paved roadways, and other artistic embellishments of decorative landscape gardening. It took some time therefore to disabuse their minds of this idea and convince them that the true object of the movement was a Reservation of natural beauty, not a formal park, and that the sole aim was to restore the landscape as nearly as possible to its normal condition and preserve its beauty unadorned."<sup>40</sup>

But inertia and misunderstanding were by no means the greatest obstacles that were met. The hardest task was to win those who had their own interests to serve in opposing the reservation movement — the riparian owners and concessionaires whose property would be taken and whose privileges would be abolished by a free public Reservation, and the State officials who were averse to leaving behind them a depleted treasury.

In addition to the classes already mentioned there were many who were opposed to the reservation movement on the ground of principle, men who did not approve of the policy or who felt that the national government ought to finance the project. Constitutional questions had also to

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<sup>40</sup> *Ibid.*, p. 54.

be met. Many doubted whether the purchase of the lands in question constituted a "public purpose" within the meaning of the constitutional provision which set the debt limit at \$1,000,000. And supposing that the constitutional point could be successfully met, there was still the question as to whether it was expedient to bond the State to the limit of the Constitution and perhaps leave the State without resources in case of some great public emergency.<sup>41</sup>

To appreciate the obstacles encountered one must remember that the sentiment which now gives unqualified approval to the creation of the Niagara Reservation was, even in 1883, only in embryo. Public sentiment has advanced materially in the last thirty years; notions which then were regarded as the products of romantic imagination are now recognized as indices of a higher stage of culture.<sup>42</sup> In the eighties men might ridicule the idea of "bowing down to worship a waterfall" and a State Governor, when asked whether he really regarded it as right that the Falls should be fenced in, might perhaps safely reply: "Of course I do. They are a luxury and why should not the public pay to see them?"<sup>43</sup>

But the very fact that one can hardly conceive of such an attitude today shows how far public sentiment has advanced since that time.

As pointed out by President Green, of the Board of Commissioners, in an address delivered before the American Park and Outdoor Art Association, the campaign to arouse interest in the reservation movement was

"doubtless aided by the rebellion of public sentiment against the conditions by which private enterprise

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<sup>41</sup> Welch, pp. 29, 34.

<sup>42</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 21.

<sup>43</sup> Welch, pp. 7, 22.

had surrounded the Falls. The landscape had become disfigured by a multitude of factories, hotels, bazaars, icehouses, high fences, clumsy railings and stairways, hideous signboards flaunted their garish advertisements in the faces of visitors on every side; the approaches had been so skillfully barricaded that there was actually not a foot of American soil from which an American citizen could view this one of the nation's natural wonders without paying for the privilege; and to cap the climax, hack drivers, peddlers, guides and confidence men outraged public decency by their importunate demands, exorbitant actions and swindling deceits, making life miserable for those who came here for the serene enjoyment of this great spectacle. Had private greed not so far overreached itself and had it left even decently tolerable conditions at Niagara, the task of securing the public reservation would probably have been even greater than it was. It is an ill wind that blows nobody good; and looking backward, we can thank some of those now innocuous offenders for the zeal which their conduct imparted to the champions of Niagara." <sup>44</sup>

The establishment of the State Reservation at Niagara was significant for more reasons than one. It meant the establishment of a new principle and one which has since that time been widely adopted. Moreover, the victory meant the more because it came at a time when manufacturing interests were making unprecedented strides. Indeed, when we consider the business and manufacturing possibilities which Niagara offered even at that time, and reflect upon the interests affected, we marvel, not that the achievement of a free Niagara took so long, but that it

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<sup>44</sup> Annual Reports of the Commissioners of the State Reservation, XX, p. 100.

did not take longer. No one, perhaps, has better expressed the spirit of that achievement than the Hon. James C. Carter, of New York, one of the speakers at the opening of the Reservation. We quote from his address:

“The occasion upon which we are assembled has a peculiar interest which needs no aid from speech. A great commonwealth is here by her official representatives, with the Chief Magistrate at her head, to perform a solemnity, not, as sometimes, to dedicate a structure to some great purpose of public utility or charity—not to consecrate a monument to the virtue or valor of her sons—not to celebrate a great event in her annals; but to make a solemn public acknowledgment—to declare that the awful symbol of Infinite Power, in whose dread presence we stand—these visions of Infinite Beauty here unfolded to the eye, are not a property, but a shrine—a temple erected by the hand of the Almighty for all the children of men; that it cannot be desecrated without her permission, nor, therefore, without her crime; that she confesses the duty of guardianship imposed by her empire over the place; that she marks out the boundaries of the sanctuary, expels from the interior all ordinary human pursuits and claims, so that visitors and pilgrims from near or far may come hither, and be permitted to behold, to love, to worship, to adore.”<sup>45</sup>

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<sup>45</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 265.

## CHAPTER II

### THE POLICY OF THE COMMISSIONERS OF THE STATE RESERVATION AT NIAGARA

The first question to be met in the administration of the newly established Reservation was, of course, the question as to the policy of the Commissioners in the discharge of the duties imposed upon them. The problem was really not so difficult as might appear at first sight, for the ideas present to the minds of the originators of the reservation movement, urged and advertised throughout the period of propaganda, and finally laid down in the statute itself, were the freeing of Niagara Falls and the restoration and preservation of the natural scenery about them. The act of April 30, 1885, making appropriation for the payment of awards on the property taken, specifically provided that the lands in question

“shall forever be reserved by the State for the purpose of restoring the scenery of the Falls of Niagara to and preserving it in its natural condition; they shall forever be kept open and free of access to all mankind without fee, charge or expense to any persons for entering upon or over any part thereof.”<sup>1</sup>

And to this end the Commissioners were given power to

“sell and cause to be removed from the Reservation all structures, machinery and materials thereupon belonging to the State, not required to afford free and convenient access to such Reservation, nor for restoring the scenery of Niagara Falls to and preserving it in its natural condition.”<sup>2</sup>

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<sup>1</sup> Laws of New York, 1885, chap. 182, § 3.

<sup>2</sup> Laws of New York, 1885, chap. 286, § 2.

But aside from this, the task of the Commissioners was plain enough. Indeed, it was determined by the nature of the case. Obviously, the first step in any policy was the removal of the objectionable structures; the erections for commercial and manufacturing purposes which encumbered the Reservation when it became the property of the State must be gotten rid of. The work was begun at once. Fences were taken down, gatehouses closed, advertising signs disposed of, and about 150 buildings of the most diverse character gradually removed — flour, pulp, paper, planing, and brick mills; machine, carpenter, and cabinet shops; sheds, bazaar, offices, etc., of stone, brick, and wood; boat, bathing, ice and dwelling houses; a barn, a laundry, a dancing pavilion, and a hotel. In addition, numerous mill-flumes and raceways were filled up and piers, cribs, and unsightly embankments demolished.<sup>3</sup>

Needless to say, all this was not done at once. Some of the old buildings had to be retained for administrative purposes until new quarters were provided. Thus it happened that it was not until 1902 that the small brick office-building on Green Island and the frame cottage at the entrance of Goat Island were removed and not until 1908 that the objectionable inclined railway structure on the mainland was finally disposed of. The removal of these buildings may fairly be said to have completed the demolishing process.

The task of destruction was necessarily followed by one of construction. Excavations left by the removal of structures had to be filled up; unwholesome depressions had to be drained and artificial banks graded; the main shore and the islands, stripped of their natural forests to make way for the buildings now removed, had to be re-

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<sup>3</sup> Minute Books of the Commissioners, I, pp. 110, 113, 114, 118, 119, 120. Also Annual Reports of the Commissioners, II, p. 10; III, pp. 16-17; XIX, p. 55.

planted; the new view-points opened up by the removal of obstructions had to be rendered safe and accessible; old roads had to be improved and new ones laid out; bridges had to be repaired or rebuilt; appropriate buildings of administration and shelter had to be secured; an adequate water supply and lighting system had to be installed. These were labors which required careful consideration, for upon their skillful and careful execution would depend much of the ultimate success of the Reservation. It was essential that the various kinds of work required should be co-ordinated about some general principle. This principle was found in the simple formula, Back to Nature. Everything of the artificial was carefully avoided. That this was the deliberately thought out policy of the Commissioners is evidenced by the words of Commissioner Andrew H. Green, in an address on the policy of the Commission read to the Board at a meeting held September 9, 1885.<sup>4</sup> Said Commissioner Green:

“The prominent idea that pervaded the public discussion of the measure which has resulted in vesting these lands in the State was their restoration to their natural condition, a requirement expressed in very general language which, I suppose, will be interpreted by the Commission as a mandate in whatever is done, to avoid structures of glaring display — incongruous artificialities — and to keep close to nature.

“The manifestations of power here displayed are the chief attraction. The effort to divide the attention by great artificial structures would prove a miserable failure. To gardenize the natural growths of the forest would be equally a mistake. The united

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<sup>4</sup> To be found only in the manuscript collection of the Commissioners of the State Reservation.

voice of the Commission would discourage any attempt of this sort. . . . The native growths of the forest and field,—tree, shrub, flower, and verdure are to be let alone. The whole extent of the planting that is required should assimilate as far as possible the native flora of the vicinage. . . . The bridges needed . . . would be more appropriately and enduringly built of rustic stone. . . .

“Artificial structures of every kind should be limited to those actually needed for the comfort and convenience of the public, and even these should be inconspicuous and wherever possible out of sight; or in other words, such structures should be mainly underground, or be so situated as to be hidden by the trees and foliage, and all necessarily visible portions of structures should be of a solidity and dignity worthy of the surroundings.”

This was the policy of the Commission as laid down in 1885, and, though most of the constructive work of the Commission has necessarily been of much later date, the original policy has been consistently adhered to since — how consistently, the Reservation itself best bears witness.

Every effort has been put forth to make the constructive work of the Commission also in the best sense reconstructive. To this end old pictures, the recollections of old residents, and careful observation of the natural environment have been employed to assist in restoring the landscape as nearly as practicable to its original aspect. That the future might be wisely provided for and the work done to the best advantage, expert advice has been freely resorted to. The Commissioners have at various times consulted such distinguished landscape architects as Frederick Law Olmsted, Calvert Vaux, Samuel Parsons, Jr., William S. Edgerton, and George E. Kessler. The first two prepared a most interesting report in 1886,



called "General Plan for the Improvement of the Niagara Reservation."<sup>5</sup> It was a comprehensive analysis of the problems which the Reservation presented together with detailed suggestions for meeting them. Comparison of this plan with what has actually been accomplished, shows conclusively on what large lines the Reservation was conceived, how sane was the policy adopted, and how accurately forecast the future.

Sometimes it has happened that the return to nature has, in reality, been an improvement upon nature. As pointed out in the report just referred to,

"Incongruities, discordancies, disunities, and consequent weaknesses of natural scenery may result, even at Niagara, from natural causes which, though not as unpleasing to an observer of fine sensibilities as those from the so-called park improvements . . . are yet decidedly regrettable."

The Commissioners have borne this in mind, with the result that there have been added to the Reservation such charming improvements upon nature as Prospect Point, Hennepin View, Dow View, and the Loop Pond, to speak of no others.

It is quite in keeping with the insistence of the Commissioners upon naturalness that the Reservation has been kept free from monuments and memorials. In fact, it is the declared policy of the Commission "that no monuments, memorials, or gifts of any character, whether ornamental or of practical utility, shall be accepted or placed upon the lands of the Reservation."<sup>6</sup> The author had occasion to discuss this aspect of the Commission's policy in the course of an address delivered at the dedication of the Hennepin Memorial Tablet at Hennepin View

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<sup>5</sup> Supplemental Report of the Commissioners of the State Reservation, transmitted to the Legislature in 1887.

<sup>6</sup> Minute Books of the Commissioners, II, p. 214 (July 21, 1899).

on the Reservation, in May, 1910. Quotation will perhaps be pardoned:

"This park is distinctly a reservation of natural scenery. It was created for the purpose of conserving the marvelous beauty of the landscape as formed by nature and it is not a suitable place of human art. . . .

"No chiseled monument and no architectural pile can enhance the beauty of Niagara and it is not the policy of this Commission to permit the erection of structures which will obtrude themselves upon the view or which, by suggestions foreign to the purposes for which the Reservation was created, serve to distract the thoughts of visitors from the contemplation of nature. With the exception of those structures absolutely necessary for the administration of the Reservation it has been the aim of this Commission from the beginning of its existence twenty-five years ago to remove every artificial structure that could reasonably be dispensed with; and when, for the restoration, protection, and use of the park, new structures such as bridges and retaining walls have been built, they have been erected according to such designs and of such materials as would most nearly harmonize with their surroundings." <sup>7</sup>

No less important than the work of restoration was the other task imposed upon the Commission — that of preservation. This duty, like that of restoration, has been broadly interpreted. The efforts of the Commissioners have been effectively directed toward the preservation of the scenery both on the Reservation and outside of it and particularly to the preservation of the falls and the water-flow. One of the first matters taken up by the Commis-

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<sup>7</sup> Annual Reports of the Commissioners of the State Reservation, XXVII, p. 14.

sioners was the question of erosion. Attention had been directed to the necessity for some consistent policy in this line in the Olmsted-Vaux report already referred to.<sup>8</sup> The need of action was especially great at exposed points like the head of Goat Island. Consequently as early as September 6, 1887, the Superintendent of the Reservation was instructed to report a plan for the prevention of erosions at the southern end of Goat Island and the probable expense thereof.<sup>9</sup> The matter came up several times, the State Surveyor and Engineer was consulted, and the Legislature finally appealed to. In consequence of these activities, not only was the southern side of Goat Island saved, but other points both on the islands and on the main shore which had been badly eroded by water and ice were restored and protected.<sup>10</sup>

The loss of territory from landslides was found to be almost as great as from erosion and the Commissioners met the case with the same watchful care. Every precaution was taken to prevent the slipping of the soil on steep slopes by sodding, planting, and other means. Nor was this a mere temporary expedient; the same care is exercised today as was taken thirty years ago, with the result that the scenery of the Reservation has been preserved in a very real and literal sense.

So much for the preservative work of the Commission on the Reservation itself. As already intimated, the same solicitude has been entertained and expressed for the preservation of the natural scenery of the river outside the limits of the Commissioners' immediate jurisdiction. It is true, the Commissioners have no legal authority for this purpose beyond the Reservation itself, but their disinterestedness has been so evident and their efforts have been so generally respected that they have been able to

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<sup>8</sup> Supplemental Report of the Commissioners, 1887, pp. 30-31.

<sup>9</sup> Minute Books of the Commissioners, I, p. 153.

<sup>10</sup> *Ibid.*, pp. 174, 182, 192, 223, 228, 251.

accomplish much despite the lack of legal power. Their prestige is such that, in many cases, a request has sufficed to secure the desired end, whether that end was the modification of some important building plan or merely the removal of a glaringly obtrusive sign or some unsightly structure. Often, however, vigorous public protest and strenuous activity has been necessary to preserve existing scenic attractions. As a single concrete example may be mentioned the Commission's opposition, in the spring of 1907, to the bill proposing to incorporate the Lower Bridge Company. This project appeared to have no justification in a general commercial need. Moreover, it would have defaced the scenery of one of the most wonderful parts of the Niagara river, and this for no other reason, apparently, than that an opportunity might be given to collect tolls from visitors. In consequence of the earnest protest forwarded to Governor Hughes by the Commission, the bill was vetoed, July 26, 1907, among others which were found to be "unconstitutional, defectively drafted, duplicates, special laws where relief would be had under existing laws, or generally objectionable by reason of proposed changes."

Some of the most effective preservative work of the Commissioners has been in the direction of preventing the diversion of the waters of the upper Niagara river with a view to preserving the integrity of the falls and rapids. The details of this work will be discussed in a subsequent chapter. Suffice it to say here that the Commissioners have from the very beginning consistently opposed every attempt at water diversion both within the Reservation and beyond it. In the interests of this policy and to preserve the Falls in the literal sense of the word, they have not hesitated to protest again and again against legislation having in view the diversion of water from the river above the Falls. Their position in this matter was very well expressed in their twenty-first annual report. We quote :

“The grandeur of the principal features of the Reservation, however, is menaced by conditions existing outside the Reservation over which the Commission has no legal control. The land of the Reservation was purchased by the State only as a setting for the Falls of Niagara. If the Falls and Rapids did not exist there, the Reservation would not have been created. The Falls, therefore, are the capital feature, the *raison d’être*, of the Reservation. The Falls are made by the water passing over the precipice, and this water comes from beyond the jurisdiction of the Commission and is subject to conditions over which the Commission has no legal control. If the Commission were satisfied with any narrow and technical construction of its responsibility, it might be indifferent toward what individuals or the State did outside the strict limits of the Commission’s jurisdiction.

“It has not, however, been satisfied with any such limited interpretation of its responsibility. Although its legal powers stop at the boundary of the Reservation, it has felt a weighty moral obligation to defend the Falls from every effort, proximate or remote, to impair their beauty. And this effort has been made consistently, persistently, and impartially since the danger to the Falls by the diversion of their waters has become apparent.”<sup>11</sup>

The action of the Commissioners in respect to water diversion has not been negative only. They have strained every nerve to get such constructive action from the State, in the way of constitutional amendment, as would make further diversion in consequence of legislative grant an impossibility. This resource failing, they have appealed to the national government. They have worked for the

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<sup>11</sup> Annual Reports of the Commissioners of the State Reservation, XXI, p. 66.

Burton law and its extension and first suggested the necessity of international action to insure effective protection. In short, they have left no stone unturned to put the Falls forever beyond the danger of commercialization. It would be an oversight not to mention in this connection the educational work which the Commissioners have done incidentally in the course of their efforts to secure legal protection for the Falls. In hearings before legislative and congressional committees, in addresses before civic associations and bodies like the International Waterways Commission, by publishing articles, and through their annual reports, the Commissioners have rendered invaluable service by correcting popular misconceptions, describing actual physical conditions, and the effects of diversion, and pointing out the proper remedy and the governmental powers available for the purpose. Through the agencies referred to, the Commissioners have contributed not merely to the popular information and interest, but to the scientific knowledge of the question of diversion, especially to the legal and engineering aspects of it.<sup>12</sup>

Thus far all our attention has been given to the policy of the Commission in its work of restoration, preservation,

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<sup>12</sup> The Hon. Andrew H. Green, who was president of the Board of Commissioners from 1888 to 1903, was particularly active in opposition to diversion schemes. It was he who first suggested international action. *Infra*, p. 121. Commissioner Alvah K. Potter ably discussed the nature of the Federal jurisdiction before Secretary of War Taft, November 26, 1906 (Annual Report of the Commissioners, XXII, pp. 79-81). The writer, in his official capacity as president of the Commission, has been called upon to appear before various public bodies, notably the Rivers and Harbors Committee of Congress and the International Waterways Commission, in defense of the Falls. It was his privilege to point out the true depth of the American Falls, to make clear the physical conditions which made diversion such a menace to the Falls, and to urge the necessity for international protection. In this connection see the reports of the Rivers and Harbors Committee, 59th Congress, 1st Session, and 60th Congress, 1st Session, also, *How to Protect Niagara Falls*, Outlook, January 27, 1906, Vol. 82, pp. 179-189.

and, incidentally, education. These were exacting enough, but the Commission's other task, that of making Niagara free, demanded, if possible, even greater patience and foresight, for it was no easy matter to drive out and keep out the horde of hackmen, guides, peddlers, and confidence-men who had so long made life miserable for the tourist that they had come to look upon their privileges as property rights of which the Commissioners were unjustly trying to deprive them.

The Commissioners chose their policy deliberately. All sales and solicitation were strictly prohibited from the beginning. As Commissioner Green put it in the remarkable address on the policy of the Board already referred to:<sup>13</sup>

“The sale of articles that can be obtained at the stores in the near village is to be avoided. We want to create no competition with the legitimate business of the vicinity.”

This was in line with the recommendations of the State Survey in its report of 1879, for as was there pointed out:

“The distance from existing hotels and shops in the village to the most distant parts of the proposed State grounds is but a thousand yards. It will, therefore, be a hardship to no one if this ground is kept entirely free from houses of refreshment, shops, booths, and places of amusement and exhibition.”<sup>14</sup>

Of course, schemes of greater or less magnitude for invading the Reservation are constantly being proposed. Now it is an appeal for the right to sell some minor article, again it is an application for a railway right of

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<sup>13</sup> *Supra*, p. 41.

<sup>14</sup> Report of the State Survey, 1879, p. 13.

way or a scheme for the construction of a power-plant. The Commissioners have, however, resolutely and consistently excluded all such enterprises and successfully withstood all attempts to invade their jurisdiction by means of legislative grant. As a result of their well-directed efforts the Reservation has been kept free in the literal sense of that word. It is true, there is a fare of five cents on the Prospect Point Elevator by means of which the descent is made to the foot of the American Fall, but the descent can also be made by a free flight of stairs. The only other charges on the Reservation are those made by three concessionaires who hold respectively the carriage service, the steamboat privilege, and the Cave of the Winds. These concessions in no way interfere with the freedom of access to all parts of the Reservation enjoined by the Act of 1885, nor is anyone obliged to avail himself of their use. The primary object in the establishment of these concessions is not revenue but is the convenience and comfort of the public.

In their solicitude for the comfort and convenience of visitors to the Falls the Commissioners have not confined themselves to their immediate jurisdiction, but have gone beyond it. Their aim in so doing has been to protect tourists from annoyance not only within the bounds of the Reservation, but as far as possible, on the way to it. The Commissioners have at various times given special attention to the hack service in the railway stations and on the streets with a view to reducing the annoyance from importunate drivers and to insure that visitors are taken to the Reservation before being carried to more distant points.<sup>15</sup> They have used their influence with the city council to get ordinances for the protection of visitors and the prevention of undesirable practices on the borders of

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<sup>15</sup> Annual Reports of the Commissioners of the State Reservation, IV, pp. 28-39.

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the Reservation.<sup>16</sup> By such means as these many objectionable practices have been eliminated.

In addition to these more or less negative features the policy of the Commissioners has had its positive aspects. In line with this, commodious shelters and public comfort stations have been provided at various points on the reservation. In short, nothing has been overlooked which could add to the safety and convenience of the million or more persons who annually come to view the scenery of the Falls.

It must be apparent by this time how thorough and consistent, how far-sighted and disinterested, the policy of the Commissioners has been. Evidently they have taken no narrow view of their responsibilities. Indeed, no detail seems to have been too insignificant if it promised to add to the beauty of the Reservation or the comfort and convenience of the public. As already pointed out, by their efforts the Commissioners have not only in the best sense restored, but have literally preserved both the Falls and the scenery. By return to, and improvement upon, nature, they have made the Reservation truly a thing of beauty; by the abolition of abuses on the Reservation and painstaking provision for the safety, comfort, and information of visitors, they have added much to the pleasure of the tourist; and in all their activities, both on and off the Reservation, they have given a shining example of disinterested and public-spirited service.

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<sup>16</sup> Minute Books of the Commissioners, II, pp. 60-61.

### CHAPTER III

## THE ADMINISTRATION OF THE RESERVATION IN ITS PHYSICAL AND FINANCIAL ASPECTS

The control of the Reservation was, by the act of establishment, vested in five Commissioners, residents of the State, and appointed by the Governor, by and with the advice of the Senate, for a term of five years. The Commissioners receive no compensation for their services, but are entitled to receive expenses incurred in the performance of their duties. By the terms of the statute, the Commissioners select a president from among their own number and appoint a secretary and treasurer. In the Commissioners is vested the entire control and management of the Reservation. They have power

“to lay out, manage and maintain such reservation and make and enforce ordinances, by-laws, rules and regulations necessary to effect the purpose thereof, and for the orderly transaction of business, not inconsistent with the laws of this State; to fix the price to be charged by drivers of public conveyances for carrying persons for hire within the limits of such reservation; to appoint a superintendent and employ such other persons as may be needed, one or more of whom, to be designated by the Commissioners shall have the power and may perform the duties of a police constable in criminal cases; to fix the compensation of the persons appointed or employed by them.”<sup>1</sup>

In other words, the Commissioners have complete control subject only to the superior power of the Legislature.

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<sup>1</sup> Laws of New York, 1885, chap. 286, § 1.

The policy of the Board is determined by the Commissioners, and the execution of that policy is also largely in the hands of the Commissioners. Happily for the Reservation, these have, many of them, been willing to devote much time and attention to the development and improvement of the Reservation. The immediate supervision of the Reservation has, however, generally been intrusted to the superintendent appointed by the Commission. In his hands are centralized the various services of the Reservation — the labor service, the elevator service, and the police force, and he, in turn, is immediately responsible to the Commission and at the direction of its president or of the executive committee. The labor service is in charge of a foreman who is assisted by a force of unskilled laborers. In his care are the roads, paths, and such of the general repairs and maintenance work as can be done by unskilled labor. The number of men employed in this service, of course, varies greatly from season to season. The elevator service consists of a chief electrician, an assistant, and a force of ticket- and elevator-men. To them is committed the care of the Prospect Point Elevator and the Reservation telephone and lighting system. The police force is in charge of a police superintendent and consists of seven policemen and three watchmen, who, under the statute already quoted, have the powers of police constables in criminal cases. In addition to this active police force there is what, in effect, amounts to a reserve, due to the granting of police powers to some ten of the other Reservation employees. Persons arrested by the Reservation officers are turned over to the municipal authorities for trial, and all fines imposed are retained by the city. The entire Reservation service, except the unskilled laborers, the treasurer and the police superintendent, is under civil service regulation.

The problems presented by the administration are, in many respects, extraordinary. The State Reservation at

Niagara is not a quiet village green or even an ordinary city park, and the Board of Commissioners is not a board of park commissioners simply. Probably no park board ever had functions precisely similar to those imposed upon the Commissioners of the State Reservation in the restoration and preservation and freeing of the scenery of Niagara Falls. As already pointed out in the chapter on the policy of the Commission the commonplace artificialities of the average park have no place in the State Reservation at Niagara; there are no merely park-like improvements except such as are absolutely necessary for the comfort of the public. Nature must rule here and it is the business of the Commissioners to see to it that she can and does so rule.

Not only are the functions of the Commissioners unique in origin, their responsibilities are peculiar, for in addition to all the demands which the ordinary public park makes upon its administrators, the Niagara Reservation makes others due to its unusual physical characteristics. It must be borne in mind that, though the total land area of the Reservation is only about 112 acres, it has a waterfront of some seven and a half miles exclusive of the shore line of the inaccessible islands. This extensive waterfront, some of it very high and precipitous and all of it bordering the irresistible current of the Niagara, would be extremely dangerous if it were not for the specially-devised safeguards which have been erected by the Commissioners and the eternal vigilance of the Reservation employees. Moreover, the very sight of the overwhelming mass of rushing waters seems to produce a strange psychological effect upon persons of certain temperaments. In consequence of these peculiar conditions, the chief work of the administration has not been so much the prevention of overt breaches of the peace as the protection of visitors from their own intentional or unintentional indiscretions.

That the task is no small one will appear from the fact that, in spite of the vigilant and oftentimes heroic efforts of the Reservation police, the number of suicides has averaged seven or eight annually for a number of years.

To the disproportionate dangers of the place must be added the vast numbers of people who visit the Reservation and the small number of policemen available for the care of them. Since the establishment of the Reservation, the city of Niagara Falls has grown from a quiet village to a prosperous manufacturing town, containing a large percentage of foreigners who improve every opportunity to frequent the State park. In addition to the large number of local visitors, there are now not less than a million and a quarter of tourists annually. Most of these, of course, come during the short summer "season," thus helping to aggravate the administrative problem. It is estimated that during the month of July past five hundred thousand people visited the Reservation. The efficiency of administration is evidenced by the fact that, in spite of the odds with which the Commissioners must contend, the most admirable order prevails on the Reservation. Though the police force consists of but eleven men, the average number of arrests per year is not more than twenty.

The problems thus far detailed are serious enough but not of such nature that they could not be completely met if the Commissioners had adequate resources. An important problem which the Commissioners have to face is that of adapting their meagre resources to the work in hand. This brings us to the consideration of the finances of the Reservation.

The Reservation was established in 1885. During 1885 and 1886, it was maintained by the receipts from the Inclined Railway, from rentals of buildings and sales of old materials, and no appropriation was made for care

and maintenance. Since 1887, however, receipts of every kind are required to be paid into the State treasury,<sup>2</sup> and an annual appropriation has, consequently, been necessary. How much the State has appropriated for the Reservation since that time will best appear from the following table:

For acquisition .....	\$1,462,929 50
For maintenance .....	714,100 00
For special improvements .....	551,165 15
Total . . . . .	<u>\$2,728,194 65</u>

Against these figures must be put the receipts from the Reservation during the same period. These amounted to \$236,452.99.

Deduction of the total receipts from the total appropriations, shows that the net cost of the Reservation to the State up to date has been \$2,491,741.66. The net maintenance cost for the same period has been \$477,647.01, or an average of \$15,921.56 annually. How insignificant is the cost to the State per visitor appears on comparison of the net maintenance cost with the total number of visitors during the period in question. If the number of visitors since the establishment of the Reservation be placed at so conservative a figure as 20,000,000, the cost per person will have been only two cents.

In view of these figures, it will hardly be charged even by the most economical, that the Reservation has been a burden to the taxpayer. The bald statement of the State's appropriations and receipts on account of the Niagara Reservation, however, conveys no adequate idea of the actual cash value of the investment to the people of the State. In the first place, by reason of the free access now established to Niagara, visitors save the

<sup>2</sup> Laws of New York, 1887, chap. 656, § 1.

amount that they formerly paid for the enjoyment of the Falls under much less agreeable conditions. When one considers that the amount of tolls simply for admission to the grounds which are now included in the Reservation aggregated a dollar per person, and that the cost of "Seeing Niagara" with comfort was several dollars, it is apparent that there has been saved to the public, by this means alone, an amount many times exceeding the entire cost of the Reservation to the State.

To this must be added the money brought into the State and left there by the additional tourists who have been attracted in consequence of the freeing of Niagara by the establishment of State ownership. If each tourist spends only a dollar, the return covers the annual appropriation several times over. In short, in the words of the nineteenth annual report of the Commissioners:

"With the knowledge of these facts, we have no hesitation in declaring that entirely irrespective of its esthetic and educational aspects, the Reservation has been a most profitable investment for the State and has afforded a practical demonstration in this country of a principle long acknowledged in European cities and countries, that the preservation of the beautiful, the picturesque and the historical 'pays.'"<sup>3</sup>

We take up next the financial resources of the Reservation. There has been a steady increase in the amount appropriated for maintenance. This increase has, however, by no means kept pace with the increase in the number of visitors and the maintenance requirements of the Reservation. When the Reservation was opened thirty years ago, there were about 250,000 visitors annually, now there are fully five times as many. To the increased wear and tear due to the larger number of

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<sup>3</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 64.

visitors must be added the increased wear and tear attendant upon the substitution of automobiles for carriages. Nor must the added burden of policing under the new conditions and increased maintenance requirements imposed by the erection of extensive permanent improvements such as the shelters and comfort stations, the administration buildings, the lighting and heating system, etc., all of which have been added since the opening of the Reservation, be overlooked.

The receipts from the Reservation for the period under consideration were equal to about one-third the amount of the appropriation for the same period. The larger part of the receipts comes from the Prospect Point Elevator by which the descent is made to the base of the American Falls. Other sources of revenue on the Reservation are the rentals and license fees paid by the various concessionaires. The landing privilege of the steamboat Maid of the Mist brings \$600 annually; the Cave of the Winds concession, \$1,500 and in addition, \$25 for each \$50 of gross receipts over \$7,500 in each season; the carriage service pays \$100 a year; the street railway on Riverway, \$1,000. For a long time leases were made for only a year at a time. Now, however, they are made for five years. The interests of the public are guarded by making all licenses and concessions strictly revocable and subjecting the service given to the supervision of the Superintendent of the Reservation.

The financial management of the Reservation has, in some respects, been unique, for the Commissioners have, in two cases at least, used the resources of the Reservation to gain permanent improvements for which there was no appropriation available. We refer to the street railway on Riverway and the Cave of the Winds shelter on Goat Island.

First the case of the street railway. By the terms of the agreement made in 1899 between the Commissioners



and the railway company, the latter contracted to advance the money for the construction of street railway tracks in Riverway, the street on the eastern boundary of the Reservation, and to pay any expenses that might be incurred by the Commissioners for engineering and legal advice. The accounts of the company were subject to audit by the Commissioners, and the work of construction was carried on under their direct supervision and according to rules and regulations established by them. Moreover, on completion, the tracks and all work, material, and constructions connected therewith, on the Reservation became the property of the State and could be used by the railway company only under a license granted by the Commissioners and absolutely revocable at their pleasure.<sup>4</sup> It will be seen that by the terms of this agreement the State became the absolute owner of the railway property within the boundaries of the Reservation, and that without expenditure.

The license granted to the street railway company is no less interesting than the agreement just outlined. The fee agreed upon was \$1,000 annually, the first installment to be due when the advances made by the company for the construction of the tracks had been paid off. Care was taken, however, to make it perfectly clear that the fact of these advances gave the company no absolute right to the license. In other words, the license was, in the strictest sense, revocable. If, however, it was revoked before the expiration of the year for which it was paid, the company was entitled to have the unearned portion refunded by the State. The Commissioners even reserved the right to license other companies. In addition to the fee, the company must keep the space between the tracks and two feet on each side of them in such condition and repair as the Commission prescribes. For that matter, the entire

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<sup>4</sup> Annual Reports of the Commissioners of the State Reservation, XVI, pp. 45-46.

use of the tracks within the Reservation is subject to the rules and regulations of the Commissioners.<sup>5</sup>

Not only was the financing of this enterprise unique, but the scheme was model in its way. Without any expenditure the State acquired a valuable property and an assured income of a thousand dollars annually. And in the process the Commissioners parted with no part of their authority, nor was the beauty and safety of the Reservation impaired in the slightest degree. The Reservation was rendered more easily accessible, and visitors were greatly accommodated by the convenience of access and the economy of time due to the increased facilities for arrival and departure.

The case of the street railway is one instance of the resourcefulness of the Commissioners. The shelter and public comfort station on Goat Island in which are located the offices and dressing-rooms of the Cave of the Winds concession furnishes another illustration of the same quality. The second case, however, is not on exactly the same footing as that first described. In the case of the street railway the State lost no revenue during the process of construction or by reason of it, whereas in the case of the Cave of the Winds building rental that formerly was paid into the State treasury along with other receipts from the Reservation was instead applied to the payment of the shelter. The matter was arranged in 1910, when the Commissioners agreed with George E. Wright, who for many years had been allowed the privilege of conducting visitors behind the fall at the Cave of the Winds, and furnishing guide and proper clothing for the trip, that he should erect a building containing offices and dressing-rooms for use in connection with the Cave of the Winds privilege and also public comfort facilities for the general public, at a cost of about \$23,000 which was to be paid

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<sup>5</sup> Annual Reports of the Commissioners of the State Reservation, XVI, pp. 47-48,

by applying the annual rental of \$1,500 and a percentage of gross receipts over \$7,500 per season to it until it should be liquidated. The building was only completed in 1911, but by the first of January, 1913, more than half the money advanced by Mr. Wright had been paid back. As in the case of the street railway the Commissioners retain the ultimate authority and the building is the absolute property of the State.<sup>6</sup> This arrangement has been so satisfactory that it is hoped that an elevator to take the place of the Biddle Stairs on Goat Island may be obtained by the same means.

The management of the finances of the Reservation has been prudent and business-like. The Commissioners have always been careful to avoid anything even approaching extravagance, and so successful have they been that when one considers the problems of the Commissioners, the area of the Reservation, its peculiar physical characteristics, the vast numbers of visitors to it, the small police force available, and puts with these facts the comparatively meagre resources at the disposal of the Commissioners, one can not do otherwise than marvel at the results achieved as expressed in the beauty and accessibility of the Reservation and the conveniences provided for the safety and comfort of visitors. It is apparent on every hand that the Commissioners have throughout consistently held to the policy outlined by Commissioner Green in his address of September 9, 1885, already several times referred to. Said Commissioner Green:

“It is the common purpose of all the members of the Commission that economy of expenditure shall mark its progress. *Economy* interpreted as the wise outlay of whatsoever means are required to secure the ends and objects intended to be achieved, by the assumption of State proprietorship.”

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<sup>6</sup> Annual Reports of the Commissioners of the State Reservation, XXVII, pp. 26-30.

## CHAPTER IV

### THE RESERVATION PAST AND PRESENT

No better idea can be gained of the achievements of the last thirty years on the State Reservation at Niagara than by comparison of present conditions with those existing about the Falls just before the Reservation was established. The situation from which Niagara was rescued is graphically described in some letters written by Henry Norman,<sup>1</sup> to the Boston and New York papers in the fall of 1881. Says Mr. Norman:

“From the commencement of the rapids to a quarter of a mile below the fall the American shore is covered with structures of various kinds. There are ugly stone dams, a grist mill, the promenade of one of the hotels, the laundry with its linen hanging out to dry, and the ‘Mammoth Bazaar.’ Then comes Goat Island Bridge. Beyond this is a stable with its walls covered with advertising placards; then a lumberyard; then several shanties where so-called Indian goods are offered for sale; then a pulp-mill with its great heaps of saw-dust; then Prospect Park with its fancy wooden structures and electric lights. Below the Suspension Bridge the position of the gas-works is marked by a broad stream of tar running down the bank. Below this there are half a dozen mills built to the edge of the cliff. Bath Island is a little island between Goat Island and the mainland. On it are several cottages and the burnt ruins of a paper mill. A tall chimney rises amid heaps of blackened stones and rusty machinery. This mill

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<sup>1</sup> Mr. Norman was one of the most enthusiastic workers in the Reservation movement and well qualified to speak of conditions at Niagara.

is being rebuilt, and new dams are being thrown out into the rapids. In the center of the rapids above the bridge a large sign nailed to a log bears the inscription: 'Go East by the . . . . . R. R.' Standing on Goat Island and looking across the rapids, one sees this motley crowd of buildings of all sizes and colors, and bearing all sorts of announcements." <sup>2</sup>

At another time Mr. Norman writes:

"The natural attractions of the place are being ruined. . . . The banks and fences bear invitations to purchase hair balsam and ginger tonic." <sup>3</sup>

Or again:

"Niagara is being destroyed as a summer resort. It has long since ceased to be a place where people stay for a week or more, and it is now being given up to second class tourists and excursionists who are brought here by the carload. The constant fees, the solicitations of the hackmen, the impertinence of the store-keepers, have actually been so potent that it is a rare thing to find any of the best people here. . . . Several places — Prospect Park, for instance — cater to the tastes of this class alone. Several evenings in the week Prospect Park is filled with a crowd of free and easy men and women, supplied with their own tea and coffee and provisions and enjoying a rollicking dance in the Pavilion. . . . For their entertainment there is an illuminated spray fountain, and their delight knows no bounds when various colored lights are thrown upon the Falls." <sup>4</sup>

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<sup>2</sup> *Daily Boston Advertiser*, September 14, 1881.

<sup>3</sup> *New York Evening Post*, September 2, 1881.

<sup>4</sup> *Ibid.*

And from another angle :

“Undoubtedly Niagara is a most disagreeable place. There is no point on the American side from which the Falls can be viewed without payment; to drive around and visit all the places worth seeing costs a single person at least ten dollars. If you are on foot, at every few yards a hackman shouts to you for your patronage, or a low shop-girl affectionately invites you into a store.”<sup>5</sup>

In contrast with the conditions just described, and the irritation and annoyance to which visitors to the Falls were subjected before Niagara was made free, are the sylvan beauty and fresh green spaces, the peace and quiet of the Reservation today. No importunate hackman or vendor of small wares disturbs the traveler's contemplation, no artificiality grates upon his finer senses or distracts his attention from the natural beauties of the place. He may worship undisturbed in the presence of the divine beauty of the awe-inspiring spectacle.

The conditions which confronted the Commissioners on taking possession of the Reservation have been described, the work of destruction which had to precede any constructive effort has also been discussed in a previous chapter. It is our purpose here to give a more detailed account of the achievements of the Commissioners as evidenced by existing physical improvements on the Reservation. We take first the buildings erected within the last thirty years. Most conspicuous is the Administration Building in Prospect Park which was completed in 1901. This is the executive headquarters of the Reservation. Prior to its erection the offices of administration were scattered about the Reservation; the Superintendent was housed in the inclined railway building which for many years marred the

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<sup>5</sup> *Boston Daily Advertiser*, September 14, 1881.

view from Prospect Point; the offices of the Commission were in a brick building on Green Island which in ante-Reservation days had served as the office of the Niagara Falls Paper Company. The location of these buildings was inconvenient and their size altogether inadequate to the needs of the administration. The new building is an unobtrusive but handsome limestone structure, designed on lines suggested by Stanford White, standing at the entrance to the Reservation, on Riverway. Its proportions and beautifully simple lines appeal to the eye and harmonize with the surroundings. Its spacious accommodations for administrative purposes and for the convenience and comfort of visitors make it a model of its kind.

Other buildings on the Reservation that deserve mention are the three shelter and comfort stations on Goat Island. When the Reservation was established what accommodations of this sort there were, were of the most primitive description and entirely inadequate to the needs of the public. An appropriation was secured and in 1895 there was completed the shelter which stands at the entrance of Goat Island. It is an inconspicuous structure of red-brown sandstone with an overhanging red tile roof and almost hidden among the trees.

The shelter and public comfort station near the Three Sister Islands, was erected in 1911. It consists of an inviting open pavilion in the rear of which is an inconspicuous gray stone comfort station. The simple lines of the pavilion, its unadorned gray columns, its green tile roof, its location at the edge of the woods and overlooking the Canadian Rapids, make it a model of unobtrusive beauty and put it into pleasing contrast with the dilapidated wooden shelter which used to stand on the same site.

In 1911 was also completed the public comfort station, known as the Cave of the Winds Building. It is similar in style to the building just described. It serves

not only as a shelter but contains also an office and some forty dressing-rooms, for the Cave of the Winds concession.<sup>6</sup> It has ample accommodations for public comfort and a spacious and attractive piazza at the front entrance for shelter. The architectural design is peculiarly appropriate to the surroundings and was the result of suggestions made by Mr. Harold A. Caparn, a wellknown landscape architect of New York.

One of the most important improvements made on the Reservation has been the construction of the Elevator at Prospect Point, which was opened in January, 1910, to take the place of the inclined cable railway, the long flight of wooden stairs, and the old stone building which for years obstructed the view of the Falls and marred the landscape. The new construction consists of a spacious underground waiting-room, two electric elevators running in a shaft 158.7 feet deep, and a wide tunnel 110.9 feet long leading through the rock and the talus slope to a large waiting-room at the edge of the river at the foot of the American Fall. The speed and capacity of the elevators is such that together they can carry a thousand persons an hour. Alongside the elevators is a concrete stairway of 251 stairs by which the descent may also be made. In addition there is a pathway leading from the face of the cliff to the foot of the talus slope. The substitution of this underground elevator for the old exposed inclined railway was an immense improvement, for by it not only were the unsightly structures in the park and down the face of the cliff eliminated, but many new and beautiful vistas were opened up and the grove-like character of the park largely restored. The Commissioners have now under way an unobtrusive but centrally located, inclosed labor center, in which are to be located the

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<sup>6</sup> *Supra*, p. 58.



stables, shops, tool-houses and storage for implements, together with office for foreman and headquarters for laborers. The entire inclosure is of rough stone and intended to be fireproof.

Among the most striking of the permanent improvements on the Reservation are the bridges. There are now twelve of them of various types — pier, suspension, and arch, wood, steel, concrete, and stone. Their history presents an interesting study in evolution. When the Reservation came into the hands of the Commissioners, the bridges were mostly of wood, or, at best, of wood and iron on stone piers. Many of them were poorly placed, and most of them were sadly in need of repairs. The suspension type then predominated. Now but two of the twelve bridges on the Reservation are of this sort. Of course, this was not accomplished all at once. Financial considerations precluded immediate and sweeping changes and for a long time nothing was attempted beyond repairs to existing structures. The policy of the Commission was nevertheless chosen as early as 1885. As already quoted,<sup>7</sup> Commissioner Green, in his address of that year on the policy of the Board, had said: "Bridges needed. . . . would be more appropriately and enduringly built of stone." So successfully has this policy been carried through that eight of the bridges on the Reservation are now of masonry.

First of the old bridges to go were the timber ones on Riverway. One by one they have been replaced by inconspicuous arch bridges of rustic stone or boulders. The whole aim in these bridges has been to make them as inconspicuous and natural as possible. To this end copings have in some cases been entirely omitted. Wherever practicable, the loose boulders have been covered with vines.

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<sup>7</sup> *Supra*, p. 49.

The result has been not only harmonious and natural, but beautiful as well.

Next came the bridge between Goat Island and Luna Island. Originally there was here a foot bridge at the brink of the Falls. In 1894, however, a single span plate-girder bridge of wrought iron and steel resting on abutments of rubble masonry and covered with concrete and asphalt was built some yards from the brink of the Falls. It is hoped that this bridge will eventually be replaced by a suitable masonry arch bridge.

An improvement early contemplated by the Commissioners was the removal of the wooden bridge between Goat Island and the First Sister Island. Plans for a new bridge were made as far back as 1893, but it was not until 1898 that it was finally secured. It is a massive bridge of native sandstone of rustic finish.

The other two Sister Island bridges are of the old suspension type and built of wood reinforced with metal. It is hoped that these also will some time be replaced by structures more harmonious with their surroundings and in better keeping with the bridge policy of the Commissioners. The most that it has been possible to do up to this time, however, has been to substitute inclined walks of rustic stone and gravel for the stairs formerly at the approaches of the two bridges in question.

In 1901 the three wooden bridges to the Terrapin Rocks<sup>8</sup> were removed and a new bridge of steel and iron with a plank floor was erected. The next step in the evolutionary process should, of course, be a steel concrete and stone bridge.

One of the greatest works of construction accomplished since the establishment of the Reservation was the building of the two massive stone arch bridges which connect the mainland with Green Island and this with Goat Island. They were opened to the public in 1901 and took the place

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<sup>8</sup> A point upon the brink of the Horseshoe Fall.

of two very inadequate and insecure iron truss bridges which had been erected in 1856. The engineering difficulties were enormous, but, by reason of the vast improvements of modern science and the aid of the old bridge, naturally far less so than those encountered when the first bridge was built across these rapids in 1817. The new bridges are of reinforced concrete faced with stone, low and unobtrusive; their form is graceful, and their material harmonizes well with the rugged scenery in which they are set. As in the case of the First Sister Island bridge, there are spacious bays for the accommodation of the crowds who linger to enjoy the magnificent view of the American rapids which these bridges afford.

So much for the buildings and bridges. We turn now to the roads on the Reservation. Here again there has been the greatest possible improvement. When the Reservation was established such roads as there were were of the sort that would answer for the light coach and carriage traffic which was in vogue when they were constructed. They were generally built of dirt or gravel, narrow and tortuous, and altogether inadequate to the heavy automobile traffic which they were soon called upon to bear. Not only this, but many of the existing roads ceased to be of service as the various buildings to which they led were removed. The erection of new buildings, the opening of new points of view, the general process of making the Reservation more accessible, involved the laying out of a whole new system of roads, which were not much more than completed before the advent of the automobile, with the mixed vehicular traffic, made further modifications necessary. As a result of the activities of the Commissioners in this direction, there are now on the Reservation about three and one-half miles of roadway all macadamized and more than six miles of paths and trails. The main shore is skirted and Goat Island en-

circled by a triple line of roadway — a trail along the water's edge, then a foot-path, and back of that a carriage road. In addition there are crossroads and paths to, and between, the different points of interest. Because of their sylvan beauty, the river breezes, and the fine views which they afford, all the roads on the Reservation are very much frequented. The regulation of their use especially on the islands, consequently requires much care and foresight. In the interests of safety vehicles on Goat Island are allowed to go in but one direction and speed everywhere on the Reservation is limited to eight miles per hour. At points of interest where there is likely to be congestion of traffic spacious "vehicle parkings" are provided. In summer oil or calcium chloride is applied to lay the dust. In consequence of this minute attention to detail and the economy which has been exercised in the administration of the road funds, the roads on the Reservation are as good as they could possibly be on an appropriation of \$5,000 a year. Certainly the care with which they have been laid out has added not a little to the attractiveness and accessibility of the Reservation. Much, of course, still remains to be done in the way of road-making before the roads on the Reservation will be the models that the Commissioners would like to see them.

Among the notable improvements on the Reservation are those which have been achieved through the replacement of artificial by natural features. Prospect Point<sup>9</sup> is perhaps the most conspicuous example. When the Commissioners took charge of the Reservation this fine view of the Falls was surrounded by a heavy stone wall with a wide coping topped by a high iron railing. A wooden platform and a board walk helped to mar the place. Photographs of 1845 were consulted to get an idea of the point in its natural state and in 1898 the wooden platform

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<sup>9</sup> A point on the mainland and at the northern end of the American Fall.

and stone parapet were torn away and a simple iron railing substituted. In 1909 a further improvement was made by raising the surface of the point about two feet, thus giving a more comprehensive view of the Falls. To such advantage was this work done that what was formerly artificial is now pleasingly natural.

A similar transformation was wrought at Hennepin View,<sup>10</sup> which commands the best general view of the Falls from the American side. Here a wooden platform and a flight of stairs were removed and an elevation of earth and rock substituted to simulate a natural formation.

Another attractive view which has been opened up by the Commissioners is Dow View, at the northwestern corner of the Reservation. In this case a frame cottage and various sheds and fences were removed and the ground raised to secure a fine view of the Niagara Gorge.

In other parts of the Reservation new views have been developed and opened and the actual land area of the Reservation increased by the addition of made lands. The so-called "loop" driveway<sup>11</sup> is a conspicuous illustration in point. At precipitous points to which access was had by wooden stairs, either permanent stone steps or inclined paths have been substituted. Much attention has also been given to grading and planting; marshes have been drained, ponds and artificial waterways filled, unsightly elevations removed, and barren and denuded places covered with sod and planted with trees and shrubs. So successfully has this work been done that many of the most radical changes and improvements are not obvious to the casual visitor who is unfamiliar with the previous condition of things. Nature has been so admirably simulated that beauties which are in reality the product of human skill seem always to have existed.

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<sup>10</sup> A short distance downstream from Prospect Point.

<sup>11</sup> On the mainland along the American Rapids.

There have, of course, been numerous other physical improvements besides buildings, bridges, roads, viewpoints, grading and planting. Merely to mention a few: a sewage system has been provided, a water-system installed, and the mainland electrically lighted.

If the Reservation is conspicuous because of the physical improvements which have been made within the last thirty years, it is no less so by reason of the abolition of the abuses which existed before its establishment. In contrast with the old regime, all sales and solicitations are strictly prohibited on the Reservation. The carriage service is probably the most striking illustration of the new order. Instead of the horde of importunate swindlers who used to make the name of Niagara Falls hackman a by-word the world over, there is now on the Reservation one of the most inexpensive and perfect carriage services which could well be devised. This has been secured by leasing the privilege to a company and keeping the regulation of it strictly under the supervision of the Commissioners. The company in charge has ten wagonettes and nine electric automobile vans which are run at stated and frequent intervals and on a route system. The round trip of the Reservation with stop-over privileges at all points of interest costs twenty-five cents at most. In addition to this Reservation service public hack-stands are maintained at the entrance of the Reservation. These, like the Reservation service, are subject to regulation by the Commissioners.

The various improvements which have been described in this chapter are noteworthy, of course, not so much for their own sakes as for what they have added to the Reservation in the way of accessibility, attractiveness, convenience, and safety. It cannot be too often repeated that the results which have been achieved have come in spite of the comparatively meagre resources at the dis-

posal of the Commission, and are the reward, very largely, of the disinterested and efficient public service of the Commissioners who have generously sacrificed their time and convenience that the State Reservation at Niagara might be a model of administration to the country. It should be pointed out also that most of the constructive work which has been described in this chapter has been accomplished within the last ten or fifteen years, due partly, no doubt, to the fact that the time was ripe for such work, but largely to the personnel and the activity of the Commission during this period.

## CHAPTER V

### SOME LEGAL QUESTIONS WHICH HAVE ARISEN IN CONNECTION WITH THE ESTABLISHMENT AND MANAGEMENT OF THE RESERVATION

In connection with the establishment and management of the Reservation and in the course of the struggle to prevent diversion many interesting constitutional and legal questions have been raised and some learned opinions delivered. Not only was the whole park project called into question, but even after the Reservation had been established there was a whole series of problems having to do with the jurisdiction and powers of the Commissioners in the discharge of their duties. Another question which has come up is, as to the effect of a charter conditioned upon the rendition of a service. More recently questions growing out of the diversion of the waters of the Great Lakes and the upper Niagara River and involving the legal status of that river have been most prominently before the public. It is our purpose in the present chapter to confine our attention strictly to those questions which were directly connected with the establishment and management of the Reservation.

To go back to the beginning of things: During the campaign to secure the necessary appropriation for the establishment of the Reservation it was frequently objected that the preservation of scenic beauty was not a public purpose within the meaning of the Constitution of the State. The question arose in consequence of the provision made in the reservation bill for the issue of bonds to the extent of one million dollars, which was the constitutional debt limit. It was argued that such an issue would be warranted only for the purpose of meeting some great public emergency. This was the position taken by



Judge Samuel Hand, of Albany, who was legal counsellor of the Governor at the time the bill was up. It should be said, however, that on being pressed by the "reservationists," Judge Hand admitted that when he had given his opinion to the Governor he had not had the Reservation bill in mind. Indeed, he expressed himself as heartily in favor of it, and added that, in a sense, it might be considered a great public emergency, inasmuch as the opportunity to establish the Reservation might not occur again. He was even prevailed upon to modify his opinion to the Governor to this effect.<sup>1</sup>

It is not strange that there should have been difference of opinion when one stops to consider the state of public sentiment on such matters at that time and the lack of precedent. The real significance of the question was eloquently touched upon by Hon. James C. Carter in an address made on the occasion of the opening of the Reservation. Said Mr. Carter:

"The effort [to establish the Reservation] has not passed into successful accomplishment wholly without a challenge. Minds accustomed to scrutinize narrowly the objects to which it is proposed to devote the public revenue have questioned whether our civil Constitution permitted such an expenditure for the mere purpose of indulging a sentiment. The question and its decision are alike honorable. We can not appropriate public moneys to anything but a public use. But public uses should certainly be deemed broad enough to embrace the gratification of the noblest aspirations of which human nature is capable. Pitiably, indeed, would be the spectacle of a people who had paralyzed themselves against the indulgence of a sentiment. It is in their sentiments that the life of a people is most truly manifested. Are we to teach

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<sup>1</sup> Welch, pp. 29, 32, 36.

at vast expense in our schools the methods and order of nature, the ideals in poetry and art, and yet not cherish the majestic teacher that exalts all our ideals? It is our sectarian dissensions alone which prevent us from devoting any part of the public wealth to the highest of all public uses — religion; but in the worship inspired by this place we are all of one faith.”<sup>2</sup>

The decision made by the State in the establishment of the Reservation has never come up for legal adjudication. It is inconceivable that it should ever come up. Public sentiment has fully sustained the passage of the act and it has never been criticised since its passage. The establishment of the New York State Reservation at Niagara was, in fact, the beginning of a new era. No one today questions that the preservation of scenic beauty is a proper public purpose and one, moreover, warranting the use of the public money and the application of the right of eminent domain.

As soon as the Reservation was established, a whole new series of problems came up as to the powers of its officers in the management of it. One of the earliest questions to arise was as to the status of the police constables whom the act establishing the Reservation empowered the Commissioners to appoint.<sup>3</sup>

Attorney-General Tabor, in an opinion handed down September 27, 1889,<sup>4</sup> held that when the Legislature used the term “police constable” in the act just referred to,

“it had in mind the police constables of villages and meant to confer the same powers upon the persons designated police constables by the commissioners,

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<sup>2</sup> Annual Reports of the Commissioners of the State Reservation, XIX, p. 274.

<sup>3</sup> Laws of New York, 1885, chap. 286, § 1.

<sup>4</sup> Reports of the Attorney-General, 1889, Op., pp. 340-341.

as are conferred upon police constables of villages in criminal cases."

"The powers of police constables," the Attorney-General goes on to say, "are regulated by chapter 380, Laws of 1889, and by Sections 155 and 156, Code of Criminal Procedure.

"The act of 1889 provides that 'the persons appointed police constables shall have the power and be subject to the same duties in criminal and civil cases, cognizable by such justices, as constables of towns, . . . They shall have the power, and it shall be their duty to keep order in public places in the village; to arrest persons concerned in riots or noisy assemblages or who are breaking the peace . . . or the by-laws, rules or ordinances of the village, and forthwith convey them before the proper authorities to be dealt with according to law. . . .

" 'Said police constables shall have the power to execute any warrant or process issued by the justices of the peace of the county or counties in which such village is situated, . . . '

"Giving the persons designated by the Commissioners the same power and allowing them to perform the same duties in *criminal* cases, as police constables, they would have power to execute criminal warrants outside of the limits of the Reservation, issued by the justices of the peace of counties. And if issued by one of the magistrates mentioned in section 155, *supra*, they could execute it in any part of the State. In short, they have the same jurisdiction in criminal cases outside the Reservation which police constables have."

The decision leaves no doubt as to the plenary power of the Reservation police officers not only on the Reserva-

tion but also outside of it. The significance of it is plain. It means that offenders against the Reservation ordinances can be apprehended even though they may have escaped beyond the bounds of the Reservation.

A decision rendered by Attorney-General O'Malley, July 26, 1910, to the effect that police officers on the Reservation do not come within the terms of the Eight-hour Law is also of interest in this connection.<sup>5</sup> This decision, taken with the one previously quoted, means that the Commissioners have not only very large powers of control over their employees but ample powers for the preservation of law and order within their jurisdiction. That the Commissioners have not betrayed their trust in this regard is evidenced by the admirable law and order which prevail on the Reservation in spite of the insignificant number of policemen as compared with the crowds which frequent the State grounds and the extraordinary watchfulness which the peculiar physical conditions of the place necessitate.<sup>6</sup>

Other illustrations of the absolute power of the Commissioners to make rules and regulations for the government of the Reservation are not wanting. For example, in 1908 debate arose as to the right of the Commissioners to pass an ordinance requiring automobilists to remove their tire chains on entering the Reservation. The ordinance in question was as follows:

"No automobile or horseless carriage, or other vehicles wearing chains over the tires of their wheels shall enter the State Reservation at Niagara without the permission of the Superintendent."

It was argued that this regulation was in conflict with the Motor Vehicle Law and also unconstitutional because

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<sup>5</sup> Reports of the Attorney-General, 1910, Op., pp. 804-806.

<sup>6</sup> *Supra*, p. 55.

it did not apply equally to all persons. Attorney-General W. S. Jackson held that the Motor Vehicle Law did not apply to the State Reservation at Niagara, but went on to say that, in his opinion, that part of the ordinance which conditioned the retention of chains upon the permission of the superintendent was objectionable on the constitutional grounds assigned. In the words of the Attorney-General,

“The duty being imposed upon the Commissioners to maintain and preserve the Reservation, if in their judgment the use of chains upon motor vehicles within the Reservation is likely to produce injury, the Commissioners . . . may properly modify the ordinance so as to absolutely prohibit such use or to regulate the use of chains in such manner as in their judgment would effectually preserve and maintain the property under their charge.”<sup>7</sup>

The ordinance was accordingly amended by striking out the clause “without the permission of the superintendent.”<sup>8</sup>

The matter was brought up again the next year, this time by the Automobile Club of Buffalo. Attention was directed to the opinion of the Attorney-General just referred to and the question thus finally disposed of. There could, of course, be no doubt as to the advisability of the regulation. As was pointed out at the time, the ordinance was really a good one, for there was no occasion for the chains within the Reservation and the inconvenience of removing them was more than counterbalanced by the damage done the Reservation roadways by retaining them.

Somewhat similar was the question as to the authority of the Commissioners to set a speed limit. This came up

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<sup>7</sup> Reports of the Attorney-General, 1908, Op., p. 482.

<sup>8</sup> Minute Books of the Commissioners, IV, p. 168.

in 1910 in consequence of the passage of a new motor vehicle law. Attorney-General O'Malley was at once appealed to, to find out what was the effect of the new law upon the Reservation ordinance making the speed limit eight miles an hour. An opinion was rendered on October 11, 1910,<sup>9</sup> but it was so inconclusive that the situation was not much clarified. The Attorney-General seemed to think that the general law applied, apparently reversing the opinion of Attorney-General Jackson referred to above.<sup>10</sup> That all doubt might be removed the Attorney-General was again appealed to May 23, 1911. It was pointed out that the roads on the Reservation, especially on the islands, were so narrow, and that on Goat Island the turns were so sharp and so masked by trees and bushes, as to make the turning of all vehicles in one direction around the Island necessary; and, moreover, that the immense number of visitors and children made slow and careful driving absolutely imperative. Attention was called to the fact that it had been held by Attorney-General Jackson that the Commissioners were not local authorities within the meaning of the Motor Vehicle Law in force in 1908.<sup>11</sup> Inasmuch as the definition of "local authorities" and "public highway" was practically the same in the new law as it had been in the old law, the opinion of the Attorney-General was sought as to the status of the Reservation drives and the powers of the Commissioners of the Reservation.

The answer this time came in no uncertain tones. We quote from the opinion of Attorney-General Carmody, handed down May 29, 1911.<sup>12</sup>

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<sup>9</sup> Manuscript collections of the Commissioners of the State Reservation at Niagara.

<sup>10</sup> *Supra*, p. 79.

<sup>11</sup> *Supra*, p. 79.

<sup>12</sup> Reports of the Attorney-General, 1911, Op., p. 529.

“In my opinion the Highway Law in its relation to motor vehicles has no reference to the State Reservation at Niagara. The general provisions of the law relating to the Niagara Reservation are found in sections 100 to 108 inclusive, of the Public Lands Law. These statutes in effect provide for the control and management of the State Reservation by five commissioners appointed by the Governor by and with the consent of the Senate. The commissioners, it is clear, do not come within the definition of local authorities as given in section 288 of the Highway Law referred to.

“Subdivision 2 of section 102 of the Public Lands Law grants the Commissioners general powers to lay out, manage and maintain such Reservation and to make and enforce ordinances, by-laws, rules and regulations necessary to effect the purposes thereof and for the orderly transaction of business.

“The commissioners were, therefore, within their power in making reasonable regulations relative to the speed and operation of motor vehicles, regardless of the provisions of the Highway Law.”

Enough has been said to show the absolute power of the Commissioners to preserve law and order and to make road regulations for the Reservation. Their power to make rules having in view the abolition of the various abuses which existed at the establishment of the Reservation has been no less completely recognized. This is most strikingly evidenced by the control of the Commissioners over the carriage service and by the stand they have taken in the matter of solicitation within the bounds of the Reservation. Attorney-General William S. Jackson, on May 29, 1907, handed down an opinion which recognized the control of the Commissioners over hackmen and driv-

ers on the Reservation.<sup>13</sup> The Commissioners used their powers in this regard by leasing the Reservation carriage privilege to a company and retaining strict control over the service thus established and over all their drivers entering the Reservation. Although the restriction of the service to one company was felt to be a hardship, no question seems to have been raised as to the power of the Commissioners so to manage affairs until the summer of 1907. In the hope that it might be possible to annul the contract between the Commissioners and the transfer company which held the Reservation carriage privilege, lawyers were retained by the excluded drivers and the Commission notified that the Carriage Owners and Drivers Association of Niagara Falls questioned the power of the Commission to grant an exclusive privilege or franchise for the carriage service on the Reservation and suggesting that the Commission appeal to the Attorney-General for an opinion.<sup>14</sup> A committee was appointed by the Commissioners to look into the matter, and at a meeting of the Board held December 3, 1908, Commissioner Cary reported as follows:

“There are in my mind two objects to be kept in view in all actions taken by the Commissioners in relation to carriage service on the Reservation. First, the protection of visitors to the park from extortion and annoyance. Second, the furnishing of such visitors with the most satisfactory and cheapest possible means of transportation.

“Many years ago the Commissioners deemed the best method of accomplishing these objects to be

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<sup>13</sup> Manuscript Collection of the Commissioners of the State Reservation at Niagara.

<sup>14</sup> A letter on this subject written to the Commissioners by Messrs. Cromley and Gittens, Counsel for the drivers, under date of June 5, 1908, may be found among the papers of the Commissioners in their office on the Reservation.



the establishment of the Reservation Carriage Service. In my opinion the establishment of this service has accomplished the object sought. A policy so deliberately adopted by our predecessors, and maintained for so long a period of time, should not be departed from except for the best of reasons. I believe that the establishment and maintenance of such a system is within the powers of the Commissioners. If we feel that the continuance of the policy is for the best interests of the Reservation, we should adhere to it until a decision of a court of competent jurisdiction compels its abandonment.

"I recommend that we notify Messrs. Cromley and Gittens that while we greatly appreciate the courtesy with which they have treated us, we prefer to have our rights and powers, if challenged, passed upon by the courts. I further recommend that we transmit all papers in the matter to the Attorney-General, with a request that he defend any action brought, and consult with us about the same."<sup>15</sup>

This report was at once accepted as expressing the sense of the Board of Commissioners.<sup>16</sup>

No suit was ever brought. In fact the whole agitation appears to have died out. The Reservation Carriage Service still exists and is unquestioned. As a matter of convenience there are public hack-stands at designated points at the entrance of the Reservation, but vehicles from these stands are not allowed to enter any portion of the Reservation

"unless there be some passenger therein or unless the same has been sent for or previously engaged by some person desiring to ride therein."<sup>17</sup>

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<sup>15</sup> Minute Books of the Commissioners, IV, p. 164.

<sup>16</sup> *Ibid.*, p. 165.

<sup>17</sup> Ordinances of the Commissioners, § XIX, Annual Reports of the Commissioners, XXVIII, p. 19.

Thanks to this provision and the strict supervision of the Reservation Service, the park has been rid of the abuses which were rife in this regard before the Reservation was established.

Fortunately for the peace and well-being of the tourist, the power of the Commissioners has been equally recognized in the matter of soliciting as in the case of the carriage service. This subject was disposed of in an opinion rendered by Attorney-General J. C. Davies on July 8, 1899. The question at issue was as to the right of a hackman holding a veteran's license to solicit trade, to do so on the State Reservation at Niagara, the ordinances of the Commissioners to the contrary notwithstanding. The Attorney-General said in part:

"The State Reservation at Niagara belongs exclusively to the State of New York. It is managed and controlled by a Board of Commissioners who have power to establish rules and regulations relating thereto. In so far as the matter in controversy is concerned the State Reservation at Niagara is under the government and control of the Commissioners to the same extent as the realty of an individual, only subject, however, to such restrictions and qualifications as are provided by the State relating to the Reservation.

"I am therefore of the opinion that a person holding a veteran's license under Chapter 371 of the Laws of 1896, has no right by virtue thereof to solicit trade within the bounds of the State Reservation at Niagara contrary to the rules and regulations prescribed by the Reservation Commissioners." <sup>18</sup>

Surely no more unmistakable recognition of the powers of the Commissioners could be desired than this. Taken

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<sup>18</sup> Reports of the Attorney-General, 1899, Op. 292.

altogether the opinions cited bear incontestible evidence to the plenary character of the powers of the Commissioners to control their employees, preserve law and order, and protect visitors from all annoyance. In addition, they would seem to have complete control of the financial policy of the Reservation. This latter power was established in consequence of the efforts of the Commissioners to get permanent improvements without recourse to legislative appropriation, or rather, in spite of the lack of such provision.

The first case to arise was that of the hydraulic elevator which it was planned to build in place of the Biddle Stairs<sup>19</sup> on Goat Island. As far back as June 9, 1886, the Superintendent of the Reservation was authorized by the Commissioners to open correspondence relative to the erection of such an elevator to be operated and paid for out of the receipts to be derived from it. The project was discussed many times, especially in its legal aspects.

The first successful application of the use of the annual revenues of the Reservation to obtain permanent improvements was made in the case of the Cave of the Winds shelter building. The whole situation is very well put in an opinion handed down by Attorney-General Edward R. O'Malley, January 19, 1910, in answer to a request for an opinion preferred by the author, who was at that time President of the Board of Commissioners. We quote:

"I have your letter of the 19th inst., in which you ask my opinion of the following question:

"You state that your Commission has for many years given a permit to one or two persons to conduct visitors behind the Falls, furnishing a guide and proper clothing for the trip. For the clothing and the guide's services a reasonable charge is made.

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<sup>19</sup> A spiral staircase of ninety stairs on the face of the cliff between the American and the Horseshoe Falls.

The person receiving this permit has paid an annual compensation to your Commission for the State for the privilege thus given, which amount, until recently, has been \$1,500 a year. Your Commission now desires to grant this privilege to the same person who has held it for many years, for a term of five years, in return for which he is willing to construct upon the Reservation a building to be used by the public as a rest house and public comfort station and of the value of at least \$20,000. No charge will be made to any one for the use of this building or any of its accommodations, and the use of a part of it will be given the licensee for the transaction of his business.

“You state that the power to grant a permit of this character and receive therefor an annual compensation has never been doubted in the past, and that your Commission now desires to know if there is any legal objection to granting this permit and receiving compensation therefor in the construction of the building instead of in money. You also state that this building is a desirable addition to the State property, much needed for the public convenience, and that this method of erecting it will save an appropriation by the Legislature for that purpose.

“I have carefully examined the law upon this question, and it is my opinion that there is no legal objection to the course proposed.

“Section 102 of the Public Lands Law, defining the power of your Commission, states that it shall

“‘Have the control and management of the State Reservation at Niagara.’

“‘Lay out, manage and maintain such reservation and make and enforce ordinances, by-laws, rules and regulations necessary to effect the purpose thereof,

and for the orderly transaction of business, not inconsistent with law, . . . .’

“It also provided in the same section that the Commissioners shall

“ ‘Pay into the Treasury of the State on the first day of each month all receipts and earnings of whatever nature other than receipts from the State Treasurer.’

“Section 105 provides as follows:

“ ‘Gifts of property for the purpose of the Reservation.—Real and personal property may be granted, conveyed, bequeathed or devised to and taken by the State in aid of the purposes of such Reservation, or to increase the same, and on such trusts or conditions as may be prescribed by the grantors or devisers thereof, provided the same be accepted or agreed to in writing by the Commissioners. All such property shall be managed and controlled by the Commissioners, and the rents, issues and profits thereof turned into the State Treasury, except where such rents, issues and profits were specifically devised or bequeathed to be used for a specific and definite purpose.’

“Under the authority conferred upon your Commissioners by the foregoing law, it seems to me within your power that to secure the safety of the public you should grant an exclusive privilege to some one known to be reliable for acting as guide under the Falls, and that you are authorized to charge a reasonable fee for such privilege.

“If in the judgment of your Commission it is desirable to have this building erected upon the land of the State, to become the property of the State, I

see no legal objection to your receiving it instead of money in return for the grant of the permit." <sup>20</sup>

This decision means, in substance, that except for the requirement that the revenues of the Commissioners be paid into the State Treasury, the Commissioners have absolute control of the financial resources of the Reservation. It means that the Commission is more or less independent financially. In other words, it is free to use its resources to the best advantage to get permanent improvements not otherwise immediately obtainable. The decision would seem to indicate that the ultimate criterion of the powers of the Commissioners is their efficacy to serve the purposes for which the Reservation was established. Apparently the discretion of the Commissioners is complete to determine what are desirable purposes.

It would seem, moreover, that in their financial management the Commissioners are not limited to the control of the resources arising immediately from the Reservation, but that they have far wider powers. In the words of Attorney-General Carmody, in an opinion delivered in March, 1912, upon the status of the Commissioners,

"they have the power to accept through grant or devise real estate, and as to that power are not limited as to locality. That such real estate may be accepted not solely for the purposes of revenue, is quite clear from the provision that the 'rents' shall be turned into the State Treasury except where the lands are specifically devised or bequeathed to be used for a specific and definite purpose. It is contemplated therefore that the Commissioners may accept revenue producing real estate and devote the income for the purposes of the Reservation or the

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<sup>20</sup> Reports of the Attorney-General, 1910, Op., pp. 821-823.

specified purpose especially provided for by the grantor or devisor.”<sup>21</sup>

The construction of the street railway tracks in the Riverway, on the eastern boundary of the Reservation, furnishes one of the best illustrations of the financial control and the complete discretionary power of the Commissioners to carry out the purposes for which the Reservation was created.

When the appraisement proceedings for the condemnation of the lands now within the Reservation were in progress, it was found expedient to make certain concessions to property owners. The Commissioners passed several resolutions with this purpose in view, among them the following one:

*“Resolved, That this Commission did not intend in locating said Reservation and does not now intend to close up said street, to wit, Canal Street, from Niagara Street to Mill Slip, but it does intend to leave said Canal Street substantially as it now stands, the eastern boundary thereof being unchanged, simply reserving such jurisdiction over all the said street, and right to regulate the travel thereon, as will be necessary to carry out the purposes of the said State Reservation.”*<sup>22</sup>

As it happened, the property owners fronting on Canal street, now Riverway, between Niagara and Falls streets, did not assent to and did not accept the resolution of the Commissioners to the effect that the street would be kept open. They got at least part compensation. Consequently, as the attorneys for the Commissioners pointed

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<sup>21</sup> Reports of the Attorney-General, 1912, Op., Vol. II, p. 115.

<sup>22</sup> Minute Books of the Commissioners, I, p. 52.

out at the time,<sup>23</sup> it was doubtful whether the resolution in question was legally binding upon the Commissioners as to these owners. The resolution was, however, accepted by the owners of the Cataract House and the International Hotel and, therefore, binding on the Commissioners as regarded these proprietors.

There was one right which was not formally extinguished in the course of the appraisal proceedings. This was the grant of right of way on Canal street obtained by the Niagara Falls and Suspension Bridge Railway Company under an order of the Supreme Court, January, 1883. The company seems never to have attempted to press this right, but in December, 1895, it made application to the Commissioners of the Reservation to lay the tracks on Riverway.<sup>24</sup> The Commissioners were not averse to the proposition, but, the railroad law of the State did not permit the issuance of traction grants within the bounds of the Reservation.<sup>25</sup> The matter dragged on for some time, but in 1899 an amendment of the law was finally secured which provided that

“the Commissioners of the State Reservation at Niagara, by and with the consent of the Commissioners of the Land Office, may construct, without expense to the State, street railway tracks upon and along that part of the Riverway, so-called, between Falls and Niagara Streets in the city of Niagara Falls, and in their discretion may grant revocable licenses to street surface railway companies to use such tracks upon such terms as said Commissioners may prescribe.”<sup>26</sup>

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<sup>23</sup> Report by Counsel to the Commissioners of proceedings up to January 15, 1886. In the Manuscript collections of the Commission on the Reservation.

<sup>24</sup> Minute Books of the Commissioners, II, 141.

<sup>25</sup> Section 108.

<sup>26</sup> Laws of New York, 1889, chap. 710.



Opposition to the proposed street railway at once developed among the property owners on the street, and the question was raised as to the legal and moral effects of the resolution of the Commissioners first quoted and the rights of the abutting owners. Hon. Frank W. Stevens, who was retained as counsel by the Commissioners made an exhaustive examination of the legal questions involved.<sup>27</sup> In his brief he points out that since the amount of compensation given to the property owners who had refused to accept the resolution passed by the Commissioners during the appraisal proceedings left the basis upon which the awards had been made in doubt, the legal and moral effect of that resolution upon the Commissioners is necessarily somewhat uncertain. Taking up first the legal aspects of the case, Mr. Stevens goes on to say that

“it is not clear that the Commissioners had power to bind either their successors or the State. It is not clear that if they possessed such power it was acted on to such an extent as to give the abutting owners an easement in the street.”

As to the rights of the abutting owners, they can not prevent the construction of the street railway, even under the most favorable interpretation of their rights, for the fact that the State owns the property on one side of the street and the street railway company a part on the other side, will make it possible for these two, who are most interested in the construction of the railway in question, to meet the constitutional requirement that the consent of the owners of one-half the property fronting on the street be obtained for the construction and operation of a street railway. Moreover, the abutting owners

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<sup>27</sup> Annual Reports of the Commissioners, XVI, pp. 39-44.

can in this case claim no damages, since the fee of the soil of the street in question is in the State, and it is well settled by repeated adjudications that in such case there can be no damage to adjoining property arising from any reasonable use of the street for railway purposes without substantially changing its grade and which is not exclusive in its nature but leaves the street free and unobstructed for public use.

As to any moral limitations placed upon the rights of the State by the resolution of the Commissioners, in Mr. Stevens' opinion, this is a matter exclusively for the Commissioners to determine.

It is Mr. Stevens' opinion also

"that the assumption made as to the effect of the resolution is too broad, and that the abutting owners have not such an unqualified easement in the street as they would possess were it a public highway."  
". . . in seeking to condemn it for Reservation purposes the Commissioners sought to change its status. They did not wish it to remain a public highway. . . . The Commissioners obviously desired to make it a street, and their resolution so declares, and in making it a street they necessarily opened it to the travel of all the world, including the abutting owners and those who might desire to visit the abutting property. But they go further and say that they propose to reserve such jurisdiction over it and the right to regulate travel thereon *as may be necessary to carry out the purposes of the State Reservation.*

"This is meaningless unless they thereby reserve the right to establish such regulations regarding the travel as may be reasonable, having in mind the purposes of reservation. They might prohibit obnoxious vehicles, rapid driving and establish any and all

regulations necessary or proper for the comfort and convenience of the people visiting the Reservation. Possessing this power, they can, obviously, place any structure in the street, unless restricted by the Legislature, which will facilitate travel, add to the convenience of the visiting public and assist in carrying out the general plan of making the Reservation easily accessible. That a street railroad might do this and yet not take away the general character of the street can not be debated.

“By their action in taking the land, and at the same time passing the resolution, the Commissioners committed themselves to the proposition that the status of the street was to be changed, that they were to be the sole authority, subject, of course, to the Legislature, in its management, and that in such management they were to be at liberty to carry out their own ideas as to the purposes of the Reservation. We may concede that they could close the street to public travel and not in the least affect the foregoing propositions. It seems to me clear that if the Commissioners are of the opinion that the construction of the proposed railroad will subserve the purposes of the Reservation by affording greater facilities and accommodations to visitors, something beyond the resolution under discussion must be invoked to restrain them either morally or legally. That resolution, in my judgment, was carefully drafted so as to allow just such action as future commissioners should deem wise and which would not divest the street of the general character of a park road. If this be not so, then, no useful purpose can be discovered in the inclusion of Canal street within the Reservation limits. Merely to burden the State with its care, rather than the village, cannot have been the object.”

Legal objection to the proposed street railway having been disposed of by this opinion, the plan for a connecting street railway through the Riverway which added greatly to the convenience of travel and accessibility was finally consummated.

Fitting climax to the opinions thus far cited on the power and jurisdiction of the Commissioners is one handed down by Attorney-General Carmody in March, 1912, as to the status of the Commissioners. The question arose in consequence of an attempt to amend the Conservation Law by providing that the Conservation Commission should have power

“to visit, inspect, and supervise all parks, places and reservations acquired by the State for scenic, scientific or historical purposes . . . the custody and supervision of which has not been committed by law to any other state officer, or state officers, as the same are defined by Section 2 of the Public Officers Law.”

An opinion having been requested by the author, the Attorney-General, after careful examination of the law and precedents, came to the conclusion that the Commissioners of the State Reservation at Niagara were State officers within the definition of that term contained in the section of the Public Officers Law referred to above.<sup>28</sup>

Though the powers of the Commissioners are so extensive for the government and control of the Reservation, and the management of its financial resources, they are not unlimited by any means. It would seem, for example, that they have no power to grant any absolute rights of a property sort. This was established in the case of the city sewer constructed across the Reservation. Between 1885 and 1891 the Commissioners had under pro-

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<sup>28</sup> Reports of the Attorney General, 1912, Op., Vol. II, pp. 113-116.

test granted several permits to private individuals to lay sewers across the Reservation.<sup>29</sup> These permits had always been carefully guarded and no question was raised until 1907, when the city asked permission to run a storm sewer through the state lands. Attorney-General William S. Jackson was appealed to. His opinion, handed down March 8, 1907, was short but to the point. Said the Attorney-General:

“I have examined the laws relating to the creation and powers of the board and am unable to find anything therein contained which would empower you to make such grant.”<sup>30</sup>

The decision was accepted and the matter disposed of by getting legislative sanction.<sup>31</sup>

The limitation on the powers of the Commissioners in regard to property rights appears even more plainly in the case of the Cataract House conduit. This matter has come up so frequently and is still such a live issue that the facts may profitably be given in full. The story goes back to the establishment of the Reservation. On the lands which it was proposed to expropriate there existed at that time an open raceway, extending from the river to the rear of the Cataract Hotel as it now is. In order to hasten the appraisal proceedings the Commissioners of the Reservation, on May 24, 1884, passed a resolution granting the owners of the Cataract House permission to use the water flowing through the race or canal just mentioned.

“for the purposes of use in connection with that portion of the Cataract House which is not included

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<sup>29</sup> Minute Books of the Commissioners, I, pp. 190-191; II, 11-12.

<sup>30</sup> Manuscript collections of the Commissioners of the State Reservation at Niagara.

<sup>31</sup> Laws of New York, 1908, chap. 243.

within the boundaries of the said State Reservation, and such additions as they may make to the said Cataract House, as long as the said canal is left open and the water continues to flow therein; and in case the said canal is filled up by this Commission, permission will be granted to the said Trott, Jerauld, and Whitney (the owners) to lay, at their own expense, one or more pipes in the bed of the present canal of such size that they can be covered over in filling up the canal, and to draw water through the said pipes from the Niagara River to the said Cataract House, and to discharge the same through their said sewer into the river; it being understood, however, that this Commission does not undertake to maintain or preserve the dam extending out into the river at the head of the said canal, but reserves the right to destroy the same at any time; and it being further understood that this Commission is not responsible for the permanence of either said supply pipes or the said sewer pipe, and that in case any repairs should become necessary to either of them the said Trott, etc., shall have the right to enter and make such repairs, upon condition of paying all damages done by them.”<sup>32</sup>

At a meeting of the Commissioners of Appraisal held July 10, 1884, this resolution was offered in evidence by the owners of the hotel and received.

In the report which the Commissioners made to the court occurs the following definition of the property which is to be taken for the purposes of the State Reservation:

“Together with all the right, title and interest of all persons or corporations, of, in, and to the

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<sup>32</sup> Minute Books of the Commissioners, I, pp. 54-55.

premises embraced within said boundary lines, including all water rights, made land (so called), debris, titles or claims (if any) to lands lying under the Niagara River, rights of riparian owners, easements and appurtenances of every name and nature whatsoever, including all the rights of, in and to all streets or portions of streets embraced and included within said boundary lines."

The report of the Commissioners, including the provision just quoted, was confirmed at a special term of the Supreme Court held at the city of Buffalo on October 27, 1884, this notwithstanding the fact that the resolution of May 24, 1884, had been received in evidence by the Commissioners of Appraisal. The conclusion from the facts cited would seem to be that the Commissioners of Appraisal did not recognize or provide that any rights should be preserved to and continued in the owners of the Cataract House for taking water from the canal in question for their uses and purposes, but that their intention was to take all the rights and interests of whatever kind, of all parties, including those of riparian owners. In short, the owners of the Cataract House had no property in the use of the water of their raceway in any manner preserved to them, but all their rights were taken over by the State for the purposes of the Reservation.<sup>33</sup>

In 1888 the Commissioners decided to close the canal part of the way. The owners of the Cataract House were accordingly notified to lay pipes as provided in the resolution of May 24, 1884. Nothing seems to have been done, however, until 1893, when, with the consent of the Commissioners, a tunnel was finally constructed, and the raceway filled up to a point at or near Mill

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<sup>33</sup> For a review of the entire history of the Cataract House conduit see, Minute Books of the Commissioners, III, pp. 65-68.

Street.<sup>34</sup> After this nothing appears on the records of the Commission until 1905, when Peter A. Porter, at that time owner of the Cataract House, applied for permission to repair the pier or wingdam which furnished the head of water for the canal and tunnel.<sup>35</sup> This raised the whole question as to the nature of Mr. Porter's rights and the power of the Commissioners in the premises. The application and the questions at issue were referred to Commissioner Potter<sup>36</sup> for investigation and report.<sup>37</sup> The report in question was made at a meeting of the Commissioners held June 4, 1906. After reviewing the facts of the case, Commissioner Potter summed up his findings as follows:

"My conclusions, from the foregoing facts, are that the use and the continuance of the use of water flowing through said raceway are in the discretion of the Commissioners of the State Reservation. They have no power or authority to grant or confer any absolute rights in the matter in question; their discretionary powers before referred to relate only to such use of the premises as may be proper within the purposes to which the property is devoted; the purpose to which the Reservation was appropriated is expressed in the title and is therein stated to be 'to preserve the scenery of the Falls of Niagara.' The acts of the Commissioners should have in mind this express purpose.

"No permission should be given to Mr. Porter, if any, which could be construed to be more than a license revocable at all times at the will of the

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<sup>34</sup> Ibid, I, pp. 187, 188, 202, 203, 237, 244; II, 14, 42, 48, 56, 74.

<sup>35</sup> Minute Books of the Commissioners, III, pp. 18, 27, 51.

<sup>36</sup> Judge Alvah K. Potter.

<sup>37</sup> Minute Books of the Commissioners, III, p. 60.



Commissioners or the direction of the constituted authorities of the State of New York.”<sup>38</sup>

The question as to the advisability of granting Mr. Porter's application was also referred to the Attorney-General. Deputy Attorney-General McGuire, under date of January 17, 1906, gave it as his opinion that

“if the Board of Commissioners of the State Reservation at Niagara do not contemplate the immediate destruction of the said dam extending out into the river, it would be perfectly proper for them to allow Mr. Porter to make such repairs thereon as he shall see fit at his own expense, and by carefully guarded resolution of the board, such permission may be given.

“If your board decides to grant this request I would suggest that you give no right to ‘maintain’ the dam, that you give no right to build upon the dam superstructures of any kind whatever, and that in the resolution granting to Mr. Porter the right, you use the word ‘temporary’ right and have inserted in the resolution a clause to the effect that in accepting the right or privilege to make these repairs, Peter A. Porter shall not claim any right or privilege to keep and maintain this dam beyond a period when your Commission shall decide to destroy the same and remove it entirely.”<sup>39</sup>

Judge Potter's report and this decision are valuable for several reasons. One immediate interest for us is, of course, in the light they throw upon the extent of the powers held by the Commissioners. It would seem that they have no authority to grant or confer absolute

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<sup>38</sup> Minute Books of the Commissioners, III, p. 68.

<sup>39</sup> Reports of the Attorney General, 1906, Op., p. 591.

rights of any sort and that their discretion is strictly limited by the purposes for which the Reservation was established. The whole case shows the extreme care with which the Commissioners have guarded the rights of the State. That this care was justified is abundantly proved by the attempts only recently made to expand the narrowly conditioned rights conferred for certain very specific purposes into a claim to use water for commercial power development.<sup>40</sup> The facts themselves bear the best witness to the utter baselessness of such a claim.

It would appear from what has been thus far said that the powers and jurisdiction of the Commissioners have, on the whole, been very liberally interpreted. Certainly their status has been unmistakably defined. The opinions handed down in the police constable, tire, speed, carriage service, and soliciting cases, make it perfectly clear that the Commissioners have absolute control of law and order within their jurisdiction, while the decisions concerning the Biddle Stairs, the Cave of the Winds shelter building and the Riverway Street Railway show that the power of the Commissioners to determine their financial policy is just as complete as their police power. According to the street railway and Cataract conduit opinions their discretion is, apparently, limited only by the purposes for which the Reservation was established and the acts of the Legislature.

Although the powers of the Commissioners are so extensive, they are by no means unlimited. It is evident from the sewer case which has been cited and from the controversy over the Cataract Hotel conduit that the Commissioners cannot grant the property of the State absolutely or by way of easement. This has, however, been no serious handicap, for where it has been desirable

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<sup>40</sup> The plan is for the construction of an underground power plant under the Cataract House with a view to the development of electrical power from the water furnished through the conduit above described.

for the Commissioners to have the power in question they have been able to obtain it from the Legislature.

To sum up, then, what has been established by this examination of the legal questions which have come up since the establishment of the Reservation. It is clear:

1. That the preservation of scenic beauty is a legitimate public purpose warranting the use of public funds and the application of the right of eminent domain.

2. That the appraisal proceedings definitely abolished all private claims to the premises now within the limits of the State Reservation.

3. That the Commissioners are State officers within the meaning of the Public Officers Law.

4. That the Commissioners are the sole authority, under the Legislature, for the management of the Reservation, and that in such management they are at liberty to carry out their own ideas to further the purposes of the Reservation.

5. That the power of the Commissioners to make ordinances for the government of the Reservation, to control Reservation employees and services, and to determine the financial policy of the Reservation and the use of its financial resources is absolute within the limits of the purposes for which the Reservation was established.

6. But that the right to manage and control does not include the right to grant absolute property rights as against the State or any easement on its property.

The Reservation itself is best witness to the wisdom with which the Commissioners have used their powers. It cannot be doubted that the completeness of the powers with which they have been intrusted has been a valuable asset in maintaining law and order within their jurisdiction, and in the work of restoration and improvement which has been done within the last thirty years.

## CHAPTER VI

### SAVING NIAGARA FALLS

The first struggle for the preservation of the scenery of the Falls had scarcely been carried to a successful issue before a far harder fight against greater odds and more insidious dangers was on to preserve the Falls themselves by preventing the diversion of water from the river above. The history of that second struggle over the Falls dates back at least to 1886.<sup>1</sup> In that year, the first after the acquisition of the Reservation by the State, there developed a remarkable activity in hydraulic enterprise having for its object the conversion of the waters of the Niagara River.

It would be interesting to speculate upon the psychological causes of this sudden accession of commercial interest in Niagara. It is just possible that the very publicity given to the work of creating the Niagara Reservation and rescuing it from the rampant commercialism to which it had been debased may have turned the thought of the commercially inclined more strongly to Niagara as a possible source of profit, and then again the then state of the development of electrical science must be considered. Be that as it may, it is indisputable that for some reason there was, in 1886, a rush of promoters to Niagara and that since then there have been

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<sup>1</sup> For an extended "Memorandum concerning the Jurisdiction, Powers and Proceedings of the Commissioners of the State Reservation at Niagara with Respect to the Preservation of the Falls and Scenery of Niagara," see Annual Reports of the Commissioners, XXI, pp. 59-229.

In this connection see also the author's address before the International Waterways Commission, Annual Reports of the Commissioners, XXII, pp. 69-76; address to the Rivers and Harbors Committee, 59th Congress, 1st Session, H. R. 18024; *How to Protect Niagara Falls*, Outlook, January 27, 1906, Vol. 82, pp. 179-189.

almost continuous attempts, some of them open, others more or less insidious, tending to defeat the purposes for which the Reservation was established.

Strictly speaking, the Commissioners have no jurisdiction in regard to the diversion of water outside the limits of the Reservation. Had they been contented with a narrow interpretation of their responsibilities they would probably not have troubled themselves with what was going on beyond their own gates. They have realized, however, that the glory of Niagara depends upon the great volume of water which passes over the Falls, that this water is, in fact, the *raison d'être* of the Reservation, that to deprive the Falls of their water is to deprive the Reservation of its reason for existence. Accordingly, they have, from the very beginning, taken cognizance of the dangers threatening their trust from without and, in fine disregard of the technicalities of the situation, have addressed themselves to the task of doing whatever has seemed necessary to insure the protection of their charge. To this end, they have throughout consistently declined to entertain propositions or applications on the part of individuals or corporations to utilize water power at Niagara.

To take up more specifically the work of the Commissioners in opposition to water diversion: In their first annual report, in 1885, they called attention to the fact that the waters of the Niagara river belong to the State and that the riparian owners have no right to the bed of the river or to the diversion of its waters.<sup>2</sup> In their next report, that for 1886, the Commissioners called into question the right of one of the power companies<sup>3</sup> to use the land which it was occupying above the Reservation. In the proceedings which followed not only was the illegal

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<sup>2</sup> Annual Reports of the Commissioners of the State Reservation, I, pp. 6-7.

<sup>3</sup> The Niagara Falls Hydraulic Power and Manufacturing Company.

use established but important concessions were secured in favor of the State.<sup>4</sup>

Unfortunately, however, the Commissioners were not always so successful; their protests were only too often unheeded. Witness the fact that, in spite of the best efforts of the Commissioners, the Legislature, between 1886 and 1889, chartered four companies to take water from the Niagara river above the Falls.<sup>5</sup> In 1890 matters came to a sort of crisis. The Commissioners, alarmed by the number and nature of the grants made by the Legislature and the illegal attempts of one of the existing power companies to increase its diversion,<sup>6</sup> sought the advice of the State Engineer as to the effect of the increased diversion on the Falls. His reply, while reassuring, did not satisfy the Commission nor help it to meet the situation.<sup>7</sup>

Nothing daunted, however, the Commissioners returned to the attack. In their annual report for 1891 they gave publicity to the proposed operations of the power companies, but were unable to prevent the Legislature from extending the powers of one company<sup>8</sup> and charter-

<sup>4</sup> Annual Reports of the Commissioners of the State Reservation, II, p. 14.

<sup>5</sup> The Niagara River Hydraulic Tunnel Power and Sewer Company of Niagara Falls, afterwards the Niagara Falls Power Company. Laws of N. Y., 1886, chap. 83; the Lockport Water Supply Company, *Ibid.*, chap. 106; the Lewiston Water Supply Company, Laws of 1888, chap. 561; Buffalo and Niagara Power and Drainage Company, Laws of 1889, chap. 366. The right to take water was in all these cases unlimited and the State received no compensation for the privileges granted.

<sup>6</sup> The Niagara River Hydraulic Power and Tunnel Company.

<sup>7</sup> Annual Reports of the Commissioners of the State Reservation, XXI, pp. 68, 124-126.

<sup>8</sup> The Niagara Falls Power Company, Laws of New York, 1891, chap. 253.

ing still another.<sup>9</sup> In 1892 the Commission formally requested the Legislature to refuse to enact all bills having for their object the commercial utilization of the water power of the river above the Falls.<sup>10</sup> In 1893 the warning was repeated, but to no purpose; the Legislature's only answer was the incorporation of still another company.<sup>11</sup> The Commission did, however, succeed that year in blocking the attempt of one of the companies to enlarge its powers; and it also induced the Commissioners of the Land Office to insert important restrictions in a grant to the same company giving it privileges at Port Day, at the eastern end of the Reservation.<sup>12</sup>

By 1894 things had come to such a pass that it was apparent that most strenuous efforts must be made, if the Falls were to be preserved. Accordingly, in January of that year, the Commission declared to the Legislature its unalterable opposition to all legislation having in view the diversion of the waters of the upper Niagara river. Then, during February, March, and April, the Commission mustered all its forces in opposition to the power bills at that time before the Legislature. In spite of the best efforts of the Commissioners, however, four bills were passed, three in the interests of one of the existing

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<sup>9</sup> The Niagara County Irrigation and Water Supply Company, *Ibid*, chap. 259. As in previous cases, the grant was unlimited and no compensation was made to the State.

<sup>10</sup> Annual Reports of the Commissioners of the State Reservation, X, p. 8.

<sup>11</sup> The Model Town Company, Laws of 1893, chap. 707. By chap. 605 of the Laws of 1894, the name of the company was changed to Niagara Power and Development Company. Here again unlimited water rights were bestowed gratis.

<sup>12</sup> The Niagara Falls Hydraulic Power and Manufacturing Company. The company was required to get the consent of the Commissioners of the State Reservation to the erection of structures at Port Day.

companies<sup>13</sup> and another creating a new company.<sup>14</sup> It is noteworthy, though, that no grants for the use of water have been made since that memorable year.

To recapitulate: Before the creation of the State Reservation, not a single charter had been granted to a private corporation for the diversion of water from the Niagara river. It is true, there was one hydraulic canal in existence, but it had no warrant in law.<sup>15</sup> The Reservation had hardly been created, however, for the express purpose of preserving the scenery of the Falls, before the Legislature began, with singular inconsistency, to give away gratuitously the very water upon which the existence of the Falls depends. Witness the fact that between 1886 and 1894 the Legislature granted charters to seven different corporations to take water from the Niagara river. And this diversion was in addition to the illegal use of the water already mentioned and the withdrawals on the Canadian side.

How serious the situation really was appears on examination of the charters granted. In a few cases a maximum was fixed for capitalization, but in only two instances was the right to take water in any way limited and in but one case was there even a suggestion of compensation.<sup>16</sup> Even where limited, the grants were most extraordinary. For

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<sup>13</sup> The Model Town Company, Laws of 1894, chaps. 95, 605, and 754

<sup>14</sup> The Niagara, Lockport, and Ontario Power Company, Laws of 1894, chap. 722.

<sup>15</sup> The canal of the Niagara Falls Hydraulic Power and Manufacturing Company, begun in 1852.

<sup>16</sup> The Niagara Falls Hydraulic Power and Manufacturing Company is limited to the capacity of its canal, and the Niagara Falls Power Company to 200,000 horse-power. By an amendment to the charter of the latter company (Laws of 1892, chap. 513), it is provided that the right to take water from the Niagara River is conditioned upon the Company's furnishing, free of charge, electricity, power, and water, for the use of the State on the State Reservation at Niagara, when requested to do so by the Commissioners.



instance, one company<sup>17</sup> was authorized to develop 200,000 horse-power, requiring 6 per cent. of the volume of the river. In other respects also the powers granted were most extraordinary. The right of eminent domain was freely given and the companies were allowed to enforce their charges by making them a lien upon the property upon which water or electricity supplied by the company in question had been used.

As said above,<sup>18</sup> there were no more legislative grants of diversion rights after 1894. But the fight still went on. It would be tedious to recite the details of the continuous warfare which the Commissioners were obliged to maintain from year to year. The best evidence that they were winning in the long run and that they were a very effective block to the larger plans of the power companies was afforded by the bill introduced in the Legislature in 1896 to abolish the Commission altogether and transfer its powers to the Board of Fisheries, Game, and Forests.<sup>19</sup> To the credit of the Legislature be it said that it had sufficient realization of the state of public sentiment on the subject not to affront that sentiment by passing this retaliatory measure.

It would hardly be fair to leave this aspect of the subject without at least one illustration of the nature of the grants made and of the sort of work which the Commissioners were obliged to do in order to prevent the ruin of the Falls and the dissipation of the State's property. The fight made in 1904 on the Niagara, Lockport, and Ontario Power Company's efforts to get an extension of its privileges was typical.

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<sup>17</sup> The Niagara Falls Power Company.

<sup>18</sup> *Supra*, p. 106.

<sup>19</sup> Annual Reports of the Commissioners of the State Reservation, XXI, p. 74.

Under a charter granted in 1894<sup>20</sup> this company was permitted to take water from the Niagara river for the purpose of supplying pure and wholesome water and electricity to the city of Lockport and to the inhabitants of Niagara, Orleans, and Erie counties generally. No restriction was placed upon the amount of water to be taken and nothing was charged for the valuable privileges granted. The only requirement was that work should be commenced in good faith within ten years of the passage of the act.

As the ten-year period allowed by the charter drew near its close, the company sought an extension not only of the time in which to begin its work, but also of its corporate powers. In January, 1904, a bill was accordingly introduced into the Legislature to amend the charter by extending the time limit for beginning the work two years more, removing the three-county limit upon the range of the company's operations, removing the limit on its capital stock and permitting it to absorb other corporations, amplifying its purposes, enormously increasing its powers of condemnation and its right of entry upon public property, and making other provisions which the Commissioners of the State Reservation at Niagara believed to be inimical to public interests generally and to the State Reservation at Niagara in particular.

On February 18, therefore, the Commissioners adopted the following resolutions:

*"Whereas, The Commissioners of the State Reservation at Niagara have learned of the introduction by Assemblyman Thompson of a bill to amend the charter of the Niagara, Lockport, and Ontario Power Company authorizing the taking by that company of water in unlimited volume from the Niagara River above the Falls; and*

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<sup>20</sup> Laws of New York, 1894, chap. 722.

*"Whereas*, The charter already granted by the State of New York and the Commissioners of the Canadian Reservation to companies actually operating or building their works preparatory to operation, carry, when fully developed, rights for the diversion of water from the Niagara River above the Falls exceeding in amount one-third of the entire volume of the river; and

*"Whereas*, This Commission has long been observant of the serious consequences of the withdrawal of waters from the Niagara river that naturally form the volume of the Falls and has heretofore constantly opposed the granting of such charters, therefore be it

*"Resolved*, That the Commission continues to interpose its urgent remonstrance against the passage of grants giving rights for the diversion and diminution of the waters from their natural channel, believing that the very existence of the Falls is seriously threatened by privileges to take these waters that have already been granted by legislative action; and be it further

*"Resolved*, That a copy of the action of the Board of Commissioners of the State Reservation at Niagara be transmitted to the Legislature and that the Superintendent of the Reservation be instructed to appear before the committees of the Legislature to present the remonstrance of the Commissioners of the Reservation and to oppose the enactment of the proposed act."<sup>21</sup>

The bill came to a vote in the Assembly on March 1, 1904, and was declared passed in spite of the fact that it

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<sup>21</sup> Annual Reports of the Commissioners of the State Reservation, XXI, pp. 196-197.

had received less than the vote required under the Constitution for bills giving away public property.

The Commission now turned its efforts toward preventing the passage of the bill in the Senate. John G. Milburn was engaged as counsel for the Commission and he and the author appeared before the Senate Committee on Miscellaneous Corporations to speak against the bill.<sup>22</sup> A few days later Commissioner Alvah K. Potter appeared and spoke before the same committee. In their opposition, the Commissioners had the almost unanimous support of the press of the State, and the indorsement of the American Scenic and Historic Preservation Society, the Board of Trade and Transportation of New York, the Merchants' Association of New York, the Citizens Union of New York, many members of the New York Chamber of Commerce, the Buffalo Chamber of Commerce, and similar organizations throughout the State. In spite of all this opposition the bill passed the Senate.

The author as president of the Commission thereupon addressed a communication to Governor Odell requesting him to veto the bill.<sup>23</sup> In addition, Thomas P. Kingsford, Alexander J. Porter, and Alvah K. Potter, members of the Commission, and J. G. Boston, counsellor in their behalf, appeared before the Governor to argue against the bill. The measure was finally vetoed, May 14, 1904, as "contrary to the best interests of the State and contrary to the expressed will and wishes of the vast majority of our citizens."<sup>24</sup>

The arguments in opposition to the bill were most completely summarized in the letter to the Governor to

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<sup>22</sup> For these addresses see Annual Reports of the Commissioners of the State Reservation, XXI, pp. 199-213.

<sup>23</sup> Annual Reports of the Commissioners of the State Reservation, XXI, pp. 217-225.

<sup>24</sup> *Ibid.*, p. 229.

which reference is made above. Quotation will, therefore, perhaps be pardoned:

“LETTER FROM THE PRESIDENT OF THE COMMISSIONERS.

“NIAGARA FALLS, N. Y., *April 15, 1904.*

“The Honorable BENJAMIN B. ODELL, JR., *Governor of the State of New York:*

“SIR.—The Commissioners of the State Reservation at Niagara respectfully request you to approve the bill now in your hands entitled:

“‘An act to amend chapter 722 of the Laws of 1894, entitled “An act to incorporate the Niagara, Lockport and Ontario Power Company” by extending time to commence work and otherwise.’

“The original charter of the company, permits the corporation to divert water in unlimited quantity from the Niagara River above Niagara Falls, for the purpose of supplying pure and wholesome water and electricity to the city of Lockport in particular and to the inhabitants of Niagara, Erie and Orleans counties generally. It was secured in May, 1894, apparently to anticipate the constitutional inhibition of such privileges then imminent in the Constitutional Convention and not with a view to the immediate use of the franchise, for the full period of ten years, (lacking one month) has passed without the commencement of work in good faith necessary to prevent the lapse of the charter. The company now seeks not only an extension of the time in which to validate its charter by the inauguration of work, but an enormous amplification of its powers, covering the whole State.

“Against this we respectfully enter our protest, upon aesthetic, economic and legal grounds.

“Our first concern, as Commissioners of the State Reservation at Niagara, is for the grandeur of the Falls and the beauty of the Reservation. These are seriously menaced by this bill.

“This is not the statement of a mere academic theory or a remote possibility. It is a demonstrable fact—a condition almost within hand reach.

“The popular mind has been so impressed with the overwhelming greatness of Niagara Falls, that any general statement concerning their danger of obliteration is received with incredulity. The cataract has so long been accepted as the synonym for limitless volume, measureless power and endless flow, that it requires a mathematical demonstration to convince most people that it can be dried up.

“If there is any margin of doubt left about the possibility of such an untoward result, it will be wiped out by adding to the existing situation another corporation with the absolutely unlimited privilege of water-diversion granted in the charter under consideration.

“We believe that the action of the State in creating the Reservation at Niagara at an expense of \$2,500,000 for the express purpose of preserving the scenery at Niagara, warrants us in challenging this renewed attempt to rob the Falls of their glory. The sentiment to which the Legislatures of 1883 and 1885 deferred in establishing the Reservation was more than local. The documents show that it was not only National, but it was International, and the State of New York stands bound in honor before

the people of two nations to do her share to maintain the integrity of that great work of Nature.

## II

“The waters of Niagara River possess a dual value — aesthetic and economic. Flowing over the Falls, they possess both; flowing into hydraulic canals they possess only one. As to the comparative value, to the people of the State of New York, of the Niagara River pouring over the Falls, and the same river pouring through the hydraulic canals of private corporations without yielding a dollar of revenue to the State, there can be no question. Passing over the Falls and producing one of the grandest natural spectacles known, the water is worth more in dollars and cents to the shop-keepers, hotels, railroads and other industries patronized by three-quarters of a million visitors per annum than it would be worth to the people of the State diverted for the purpose of turning the turbines of a private corporation. The Falls of Niagara are now earning hundreds of thousands of dollars a year to the people of the State; and it is pertinent to inquire why this source of income should be impaired for the purpose of giving away the waters without compensation.

“The waters of the Niagara River on the American bottom have been judicially determined to belong to the State. They are therefore public property, belonging to the people in common and forming part of their common wealth. We submit that it is as wrong morally to deprive them of their common property without compensation as it is legally unconstitutional to deprive them of their private property without compensation.

“If it is apprehended that the economic development of the State will eventually demand the utiliza-

tion of the Niagara River for manufacturing purposes, then the State should reserve it as a future resource of revenue if it does not need it now.

"Electrical science is conceded to be in its infancy; and yet it is far enough advanced to reveal in the current of the Niagara a mine of wealth. Why should not the State reserve to itself the revenue from this mine, as, from time immemorial, government has reserved to itself the undiscovered gold? With the growth of the State, the necessary increase in the cost of government, the growing indisposition to resort to direct taxation for its support, and the necessity for finding new sources of revenue which even now taxes the ingenuity of our statesmen, it would seem to be the height of indiscretion and the acme of folly to dissipate now this resource which we may imperatively need in the future.

"Neither is there any reason why the State should not avail itself of this juncture of affairs with respect to the charter under consideration and reserve this resource as above suggested. There is no present public demand or imperative exigency for this prodigal bestowal of Niagara water. If there were, sufficient capital would have been forthcoming during the past ten years for the commencement of work in good faith under the original charter.

"We therefore repeat, that the highest considerations of public policy dictate the conservation of this resource; and if the time ever comes when utilitarian reasons overcome the aesthetic with respect to the Falls, and the waters of the river must be used for manufacturing purposes, then the privileges should be dispensed by the State with a proper regard for their value and with the exaction of a proper revenue.



## III.

"We also respectfully submit that this bill has not been legally enacted.

"As before stated, it has been determined judicially that the waters of Niagara River belong to the State. They are therefore public property. The bill in question gives away public property for a private purpose. The Constitution requires a two-thirds vote to pass such a bill. Neither the original act of 1894 nor the bill under consideration received the two-thirds vote of both houses required by the Constitution.

"The extraordinary declaration of the bill itself that all real property and waters required by the corporation 'shall be deemed to be required for a public use' does not make a 'public use.'

"This is inserted obviously for the purpose, among other things, of meeting the requirements of the Bill of Rights and paving the way for the wholesale condemnation proceedings which the bill attempts to authorize. The Legislature has in effect attempted to exercise the power of omniscience. It looks into the future, foresees every step that the corporation may take, knows exactly every piece of property that it will hit upon, understands fully what it will be used for, and with all this extraordinary equipment of prescience, declares that everything that the company may covet or desire of other men's goods 'shall be deemed to be required for a public use.'

"This declaration is not only an absurdity, but it possesses a more serious complexion, for it is an attempt by the Legislature to encroach upon a distinct function of the judiciary. If a proposed use of property be public, the Legislature may delegate the power to take the property; but the question as

to whether the use is a public use is a judicial one to be determined by the courts. The fundamental principles of our form of government require that the functions of the three different branches should be preserved distinct; and this attempted usurpation of the prerogative of one by another should not, we respectfully submit, receive the sanction of the executive.

"In conclusion, we beg to invite your attention to the following general reasons why, in our estimation, this bill should not become a law.

"The bill gives the corporation power to enter upon and use any land, street, road, or public ground anywhere in the State, excepting only the lands and waters of the Erie canal. Under these powers it can invade the State Reservation at Niagara which the State is in honor bound to preserve inviolate, or any other public reservation.

"Under the same powers, when, once permitted to enter a city, the company can utilize public parks, streets and avenues for its purposes, and can even change the location and grade of streets.

"It is given sweeping powers of condemnation. Under the declaration of the bill that any property which this corporation may desire is for 'public use' every man's property is subject to appropriation by it. He must either sell it at the company's price or submit to condemnation.

"Although ostensibly chartering the corporation for the production and sale of electric light, heat and power, the bill expressly gives the company all the powers of a transportation corporation.

"The bill transforms the company from a supplier of 'pure and wholesome water and electricity,' with a range of operation limited to three counties, into a company for the manufacture, sale and use

of electricity for light, heat, power or 'any other purpose' anywhere in the State.

"It grants the corporation powers which collectively no other corporation possesses; permits it to absorb the stocks and bonds of other corporations less fortunate; and to issue capital stock therefor and for other purposes without limit.

"It provides no control over the transmission routes of the corporation, either for the protection or for the benefit of the public.

"The Legislature reserves no control over this gigantic creature, but makes it the repository of such powers that the company and not the Legislature will hereafter be able to dictate the dispensation of similar grants.

"The State is under no moral obligation to make good the shortcomings of the company in not availing itself of its charter within the original ten year limit which will expire in May.

"The original bill was a legislative error which can and should now be retrieved and should not be perpetuated and vastly augmented.

"We therefore renew our request that you veto the bill.

"In behalf of the Commissioners of the State Reservation at Niagara.

" (Signed) CHARLES M. DOW,  
" *President.*"

Thus far we have confined our attention to the struggle in the Legislature. In 1894 the fight was carried into the Constitutional Convention. The President of the Niagara Commissioners, Andrew H. Green, finding himself a member of the Convention of 1894, determined to utilize this instrumentality, if possible, to hedge the Reservation about with a constitutional provision. He suc-

ceeded in having a resolution adopted by the Convention authorizing a special committee to report whether an amendment should be made to the Constitution restraining the Legislature from granting to corporations or to individuals the right to divert the waters of the upper Niagara river, and to inform the Convention of the rights and privileges which had already been granted, their nature and extent and the consideration which had been paid therefor.

The committee appointed visited Niagara Falls and after carefully investigating the whole subject, presented to the Convention a comprehensive and interesting report,<sup>25</sup> and proposed the following amendment to the Constitution:

“No charter, license or privilege to divert from their natural channel the waters of the Niagara River, or any portion thereof, above Niagara Falls, shall be granted to any corporation, association, person or persons, except for sanitary, domestic or fire purposes and such water shall not be diverted for any purpose except as herein indicated.

“All corporations, associations, person or persons who have heretofore been licensed or granted the right to divert the waters of said river shall be under the direction and control of ‘The Commissioners of the State Reservation at Niagara,’ or such other official or officials as may be given control of said Reservation. Each of said corporations, associations, person or persons shall only be permitted to divert any portion of the waters of said river in such amounts and upon such conditions and for such com-

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<sup>25</sup> Annual Reports of the Commissioners of the State Reservation, XXI, pp. 152-167.

pensation to the State as said Commissioners or official or officials having charge of the said Reservation shall prescribe and determine. But this section shall not be so construed as to prevent the Legislature from altering, suspending or repealing any or all grants or charters which permit the waters of the Niagara River to be diverted from their natural channel.”<sup>26</sup>

As may be imagined, this proposed amendment not only called forth much discussion in the Convention, but aroused active opposition outside of it. There can be no doubt that every influence was brought to bear to secure the defeat of the amendment. It is not surprising, therefore, that it was finally lost. It was not until 1904 that another attempt was made to get constitutional protection for the Falls. This also failed. It was, perhaps, quite natural that the Convention of 1894 should have been disinclined to revoke licenses already granted to corporations, but, as was pointed out at the time, there was no reason why it should not have adopted an amendment providing for compensation to the State and limiting in some way the amount of water to be taken and the purposes for which it might be used.

In 1895, the Commission tried another expedient. It formally complained to the Attorney-General of the State that a certain company<sup>27</sup> was illegally diverting water from the Niagara river and called upon him to protect the interests of the State.<sup>28</sup> The Attorney-General, in his opinion, made four important declarations:

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<sup>26</sup> *Ibid.*, pp. 166-167.

<sup>27</sup> The Niagara Falls Hydraulic Power and Manufacturing Company.

<sup>28</sup> For the correspondence on this subject and the opinion of the Attorney-General, see Annual Reports of the Commissioners of the State Reservation, XXI, pp. 129-140.

*First.* That the company had no right to increase the capacity of its diversion canal and could be restrained.

*Second.* That the company had no right to divert any water and could be restrained.

*Third.* That a diversion of water sufficient to diminish the flow over the Falls was a nuisance and could be restrained.

*Fourth.* That the nuisance could be abated at the suit of the Attorney-General.

This was an important victory for the Commission. To be sure, the Attorney-General did nothing to put his excellent opinion into practice, and the company in question had its disputed rights confirmed by the Legislature.<sup>29</sup> Still the general legal principle was established and that was a victory, if only on paper.

The Commissioners had tried to prevent legislative grants of water rights, to get constitutional protection, and to move the Attorney-General to action. Another resort was to get repealed the grants which they had been unable to prevent. In the winter of 1906, accordingly, bills were introduced for the repeal of all dormant charters. The attempt met with some success for four of the charters were revoked. Several, however, still remain on the statute book and the companies holding them claim the right to draw water from the river above the Falls.<sup>30</sup>

Disappointed with this slight success in the Legislature and with the failure to secure constitutional protection, the Commission in 1894 turned its attention to the Fed-

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<sup>29</sup> Laws of New York, 1896, chap. 968.

<sup>30</sup> The Niagara, Lockport, and Ontario Company, Laws of 1894, chap. 722; the Niagara Power and Development Company, Laws of 1893, chap. 707; the Niagara County Irrigation Company, Laws of 1891, chap. 259.

eral Government. In October of that year, Andrew H. Green, the president of the Commission, carried the matter of protecting Niagara to the United States Secretary of State, urging that correspondence be opened with the Canadian minister of State with a view to securing permanent protection by international agreement.<sup>31</sup> A letter was also written to the Canadian Commissioners to invite their co-operation.<sup>32</sup> So far as is known, this was the first attempt to secure international action for the protection of the Falls since the earlier efforts to secure co-operation of both sides of the river in the establishment of the original reservations.

The Commission began its campaign for the assertion of federal jurisdiction over the waters of the Niagara river in its report of January, 1896, by the assertion of principles which found recognition ten years later in the Burton Law.<sup>33</sup> In pursuance of the suggestions of the report just referred to, Senator Guy, on April 29, 1896, offered a resolution in the State Senate requesting the federal government to initiate proceedings to secure the permanent exemption of the Great Lakes and upper Niagara river from diversion schemes.<sup>34</sup> This was the beginning of a propaganda that was kept up five years along the line of State restriction, federal control, and international agreement.

In 1900, the campaign took new impetus in consequence of the scheme to construct a dam or jetties at the head of the Niagara river to raise the level of Lake Erie. Finally, in 1901, through the efforts of the then Presi-

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<sup>31</sup> Annual Reports of the Commissioners of the State Reservation, XXI, pp. 126-128.

<sup>32</sup> *Ibid.*, pp. 128-129.

<sup>33</sup> Annual Reports of the Commissioners of the State Reservation, XII, pp. 9-11.

<sup>34</sup> *Ibid.*, XXI, p. 179.

dent of the Commission Andrew H. Green, with the co-operation of the United States Senator Thomas C. Platt, the matter was brought before Congress. In February, 1902, Senator Platt succeeded in introducing a joint resolution for the purpose of inquiring into the subject of the diversions of the waters of the Great Lakes and rivers constituting the boundary between the United States and Canada. The measure became section 4 of the River and Harbor Appropriation bill, and as such received the approval of the Executive, June 13, 1902.<sup>35</sup> Under the terms of the act the President of the United States was authorized to appoint three commissioners to represent this country in conjunction with a commission of equal numbers representing the government of Great Britain to investigate the subject. Mr. Green was contemplated for appointment but was opposed by local interests on the ground that his views concerning the diversion of the waters from Niagara were so well known that he could not act impartially. The American members of the Commission were appointed in 1903 but it was not until 1905 that the Canadian representatives were appointed by the Dominion government and the Commission organized for work.

The Commissioners of the State Reservation at Niagara were not slow to take advantage of the opportunity which the Waterways Commission promised for investigation and discussion of diversion on the Niagara river. At the very first meeting of the Commission, held May 25, 1905, the author, in his capacity as President of the Niagara Commission, called the attention of the Waterways Commission to the advisability of recommending that no further grants for the diversion of the waters of the Niagara river be made. And the Board

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<sup>35</sup> Statutes of United States, 57th Congress, 1st Session, chap. 1079, § 4.



of Commissioners at a meeting held September 13, 1905, passed the following resolution:

*“Resolved,* That this Board earnestly requests the International Waterways Commission to urge upon their respective governments the necessity and reasons for preventing the further diversions of the waters of the Niagara River from their natural course over the Falls.”<sup>36</sup>

The International Waterways Commission took up a wide range of questions, dealing not merely with “the uses of the waters in the Niagara river for power purposes and the regulations necessary to insure an equitable diversion of the waters between the two countries and the protection of Niagara Falls as a scenic spectacle,” but with remoter influences affecting the volume of water passing over the Falls, as, for instance, the Chicago Drainage Canal and the diversion on the upper lakes.<sup>37</sup>

There was some question as to the jurisdiction of the Commission in the matter of diversion other than that immediately affecting the navigability or boundary character of the stream, but this was disposed of by a joint resolution of Congress requesting the Commission

“to report to Congress, at an early day, what action is, in their judgment, necessary and desirable to prevent the further depletion of water flowing over Niagara Falls,”

and also requesting and directing the American members

“to exert, in conjunction with the members of the said Commission representing the Dominion of

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<sup>36</sup> Minutes Books of the Commissioners, III, p. 25.

<sup>37</sup> Annual Reports of the Commissioners of the State Reservation, XXII, pp. 18-20.

Canada, if practicable, all possible efforts for the preservation of the said Niagara Falls in their natural condition."

On September 14, 1905, the International Waterways Commission held a session at Niagara Falls, at which Judge Alvah K. Potter, member of the Niagara Reservation Commission, and the author, as President of the latter Commission, presented the arguments for international action to prevent further diversion of water from Niagara Falls.<sup>38</sup>

On October 28, 1905, the Waterways Commission passed the following resolution, of which copies were sent to the Secretary of War of the United States and to the Minister of Public Works of Canada:

*"Resolved, That this Commission recommends to the governments of the United States and Canada that such steps as they may regard as necessary be taken to prevent any corporate rights or franchises being granted or renewed by either Federal, State, or provincial authority for the use of the waters of the Niagara River for power or other purposes until this Commission is able to collect the information necessary to enable it to report fully upon the 'conditions and uses' of those waters to the respective governments of the United States and Canada."*<sup>39</sup>

Careful study of the existing situation made it more and more apparent that the greatest danger to the Falls threatened from the Canadian side and so forced home the necessity of international action if the Falls were really to be saved. The Legislature of New York sent

<sup>38</sup> Annual Reports of the Commissioners of the State Reservation, XXII, pp. 69-81.

<sup>39</sup> Progress Report to the Secretary of War, December 1, 1905.

a memorial to the President of the United States, asking that negotiations be opened with Great Britain for the purpose of framing a treaty which should prevent the diversion of waters from the Niagara river to the injury of the Falls.<sup>40</sup> The American Civic Association, through its President, J. Horace McFarland, took up the question of the legal rights of the United States and the international relation of the Niagara river as a boundary stream and in resolutions called the matter to the attention of President Roosevelt and Earl Grey. The national importance of the subject was officially emphasized in December, 1905, by President Roosevelt in a message to Congress, in which he said:

"It is greatly to be wished that the State of New York should copy as regards Niagara what the State of California has done as regards the Yosemite. Nothing should be allowed to interfere with the preservation of Niagara Falls in all their beauty and majesty. If the State cannot see this, then it is earnestly to be wished that she should be willing to turn it over to the national government, which should in such case (if possible in conjunction with the Canadian government) assume the burden and responsibility of preserving unharmed Niagara Falls, just as it should gladly assume a similar burden and responsibility for the Yosemite National Park."<sup>41</sup>

Public sentiment became acute upon the subject of the integrity of the Falls. The press was aroused. During the fall of 1905 and the spring of 1906 various prominent magazines published articles on the Niagara situa-

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<sup>40</sup> Annual Reports of the Commissioners of the State Reservation, XXI, pp. 179-180.

<sup>41</sup> Annual Reports of the Commissioners of the State Reservation, XXII, p. 22.

tion, calling attention to the national and international aspects of the subject and the dangerous effects of further diversion. The report of the International Waterways Commission, presented March 27, 1906, only served to give new impetus to the agitation, for it was discovered that this report, while it properly regarded the national importance of Niagara Falls, yet recommended the vitalizing by federal legislation of practically all power grants on the American side. The American Civic Association and the Merchants' Association of New York, called upon the President and presented petitions for the prevention of further diversion. Senators and representatives and the Secretary of War were bombarded with personal letters urging the preservation of the Falls.

The State of New York was moved to action. Governor Higgins urged co-operation with the national government by limitation of the water rights of existing companies, by repeal of undeveloped charters, and by institution of legal proceedings for the forfeiture of the charters of companies misusing their franchises or abusing their powers.<sup>42</sup> In pursuance of the Governor's message a bill was introduced to limit the use of Niagara waters and a legislative inquiry instituted into Niagara power charters. An effort was also made to secure a constitutional amendment for the protection of the Falls.<sup>43</sup>

It is evident from the utterances of the President of the United States and of the Governor of New York above quoted, from the activity of the Legislature, and from the position of the public press that the subject of the salvation of Niagara was a prominent one at that time. President Roosevelt, in transmitting the report of the American members of the International Waterways Commission, had said:

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<sup>42</sup> *Ibid.*, p. 25.

<sup>43</sup> *Ibid.*, pp. 25-28.

"I earnestly recommend that Congress enact into law the suggestions of the American members of the International Waterways Commission for the preservation of Niagara Falls, without waiting for the negotiation of a treaty. The law can be put in such form that it will lapse, say in three years, provided that during that time no international agreement has been reached. But in any event I hope that this nation will make it evident that it is doing all in its power to preserve the great scenic wonder, the existence of which, unharmed, should be a matter of pride to every dweller on this continent."

The immediate result of this recommendation and the public ferment described above was the passage of the Burton Bill, June, 1906,

"for the control and regulation of the waters of the Niagara River, for the preservation of Niagara Falls, and for other purposes."<sup>44</sup>

Section 1 of the act forbade diversion from the Niagara River or its tributaries in New York, except with the consent of the Secretary of War and as provided for in the act.

Section 2 authorized the Secretary of War

"to grant permits for the diversion of water in the United States from said Niagara River or its tributaries for the creation of power to individuals, companies, or corporations which are now actually producing power from the waters of said river, or its tributaries, in the State of New York or the Erie canal, also permits for the transmission of power from the Dominion of Canada into the United

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<sup>44</sup> Statutes of United States, 59th Congress, 1st Session, chap. 3621.

States to companies legally authorized therefor, both for diversion and transmission, as hereinafter stated, but permits for diversion shall be issued only to individuals, companies or corporations, as aforesaid, and only to the amount now actually in use or contracted to be used in factories, the buildings for which are now in process of construction, not exceeding to any one individual, company, or corporation, as aforesaid, a maximum amount of 8,600 cubic feet per second, and not exceeding to all individuals, companies, or corporations as aforesaid, an aggregate amount of 15,600 cubic feet per second; but no revocable permits shall be issued by the said Secretary under the provisions hereafter set forth for the diversion of additional amounts of water from the said river or its tributaries until the approximate amount for which permits may be issued as above, to wit, 15,600 cubic feet per second, shall for a period of not less than six months have been diverted from the waters of the said river and its tributaries, in the State of New York; provided, that the Secretary, subject to the provisions of section five of this Act, under the limitations relating to the time set forth above is hereby authorized to grant revocable permits, from time to time, to such individuals, companies or corporations or their assigns, for the diversion of additional amounts of water from the said river or its tributaries to such amount, if any, as, in connection with the amount diverted on the Canadian side, shall not injure or interfere with the capacity of said river, or its integrity and proper volume as a boundary stream, or the scenic grandeur of Niagara Falls, and that the quantity of electric power which may by permits be allowed to be transmitted from the Dominion of Canada into the United States, shall be 160,000 horse-power, provided further, that

the said Secretary, subject to the provisions of section five of this Act, may issue revocable permits for the transmission of additional electrical power so generated in Canada, but in no event shall the amount included in such permits together with the said 160,000 horse-power and the amount generated and used in Canada, exceed 350,000 horsepower; provided always, that the provisions herein permitting diversions and fixing the aggregate horsepower permitted to be transmitted into the United States, as aforesaid, are intended as a limitation on the authority of the Secretary of War, and shall in no wise be construed as a direction to said Secretary to issue such permits, and the Secretary of War shall make regulations preventing or limiting the diversion of water and the admission of electrical power as herein stated; and the permits for the transmission of electrical power issued by the Secretary of War may specify the persons, companies or corporations by whom the same shall be transmitted, and the persons, companies or corporations to whom the same shall be delivered."

Under section 4 the president of the United States was requested

"to open negotiations with the government of Great Britain for the purpose of effectually providing, by suitable treaty with the said government, for such regulation and control of the waters of the Niagara River and its tributaries as will preserve the scenic grandeur of Niagara Falls and of the rapids in said river."

Section 5 provides that the act shall remain in force for three years from and after the date of its passage and that at the expiration of that time all permits granted

under it by the Secretary of War shall terminate unless sooner revoked. The section further provides that the

“Secretary of War is hereby authorized to revoke any or all permits granted by him by authority of this Act, and nothing herein contained shall be held to confirm, establish, or confer any rights heretofore claimed or exercised in the diversion of water or the transmission of power.”

As was pointed out by Secretary of War Taft, the plain purpose of the act was to restrict, as far as lay in the power of Congress, such diversion of water as would reduce the volume of the Falls and the plan of Congress in so doing was to effect this purpose by directly prohibiting the diversion of water on the American side, and by taking away the motive for diverting water on the Canadian side, by denying electrical power generated in Canada a market in the United States. The whole tenor of the act shows that Congress apparently wished to accomplish its purpose with as little sacrifice of pecuniary interests as was consistent with the preservation of the integrity and volume of the Falls.

The Burton Act was merely a temporary expedient at best, but even this was not obtained without a struggle. The bill was viciously attacked and radically changed in form before it was passed. At the hearings before the Rivers and Harbors Committee the case of Niagara Falls was most exhaustively argued from every point of view. The Commissioners exerted all their influence to secure the passage of the bill. Through their counsel, Hon. Frank W. Stevens, they strongly presented to the committee the legal aspects of the case and the necessity for legal action. The author, in his capacity as president of the Niagara Commission, also appeared and explained the physical conditions which made diversion such a



menace. In the course of the proceedings much light was thrown upon the situation at Niagara and some erroneous notions corrected.<sup>45</sup>

Secretary Taft, in whose custody the Burton Act placed the Falls, promptly took up his work. Hearings were held and the power plants inspected. Again the case for the Falls was exhaustively argued. Protest was particularly strong in regard to the importation of power from Canada for it was here that the law allowed the Secretary the greatest discretion. Opposition was based mainly on esthetic and diplomatic grounds and letters of protest from various quarters rained on the Secretary of War for some three weeks. Finally, in January, 1907, was published the "opinion" of Secretary Taft giving his decision in regard to the use of water on the American side and the transmission of electrical power from Canada. The Secretary permitted the use of water and admitted power to the extent allowed by the Burton Act.

The Burton Act was originally passed for three years. It was several times extended, but finally lapsed on March 4, 1913. Since then the treaty with Great Britain which was promulgated in May, 1910, has set the limit of diversion. Article V of this treaty deals particularly with the Niagara River and Falls and provides as follows:

"The high contracting parties agree that it is expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream shall not be appreciably affected. It is the desire of both parties to accomplish this object with the least possible injury to investments which have already been made in the construction of power plants on the United States side of the river under grants of authority from the State of New York, and on the Canadian side of the river

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<sup>45</sup> 59th Congress, 1st Session, H. R. 18024.

under licenses authorized by the Dominion of Canada and the Province of Ontario.

"So long as this treaty shall remain in force, no diversion of the waters of the Niagara River above the Fall from the natural course and the stream thereof shall be permitted except for the purposes and to the extent hereinafter provided.

"The United States may authorize and permit the diversion within the State of New York of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of 20,000 cubic feet of water per second.

"The United Kingdom, by the Dominion of Canada, or the Province of Ontario, may authorize and permit the diversion within the Province of Ontario of the waters of said river above the Falls of Niagara, for power purposes, not exceeding in the aggregate a daily diversion at the rate of 36,000 cubic feet of water per second.

"The prohibition of this article shall not apply to the diversion of the water for sanitary or domestic purposes, or for the service of canals for the purposes of navigation."

Article XIV provides that the treaty "shall remain in force for five years, dating from the day of exchange of ratifications, and thereafter until terminated by twelve months' written notice given by either high contracting party to the other."

It will be noticed that the treaty places no limit upon importation of power from Canada and that it is more liberal in the matter of diversion on the American side than was the Burton Act. As long as the Burton Act was in operation the 4,400 cubic feet per second by which it fell short of the treaty were urged against it by those

opposed to the limitation of diversion. Question was also made as to the right of the Secretary of War to grant the permits provided for under the Act. This point was urged with renewed force upon the lapsing of the Burton Act and apparently, justly so, for by an opinion recently rendered by the Attorney-General of the United States it is held that the Secretary of War has no jurisdiction, but that it lies with the executive to regulate diversion under the treaty.

Since the lapsing of the Burton Act efforts have not been wanting for the renewal of that act or the passage of one similar to it. Thus far, however, these efforts have been of no avail owing to the opposition of the interests and of the State of New York which holds that jurisdiction over the granting of permits for diversion to the amount allowed by the treaty belongs to it as owner of the bed and waters of the Niagara River. The matter, therefore, stands at it has been left by the opinion of the Attorney-General above referred to.

Briefly to summarize this very short history of the saving of Niagara Falls. As pointed out in the beginning of the chapter, the movement for the preservation of the Falls was really a double one: first, a movement to preserve the scenery of the Falls which culminated in the establishment of the State Reservation in 1885; and, second, a movement to save the Falls themselves by preventing the diversion of water from the Niagara River, a struggle which began in 1886 and continues to our own day. The Commissioners have persistently and consistently opposed all diversion schemes from the very beginning, and have left no stone unturned in active support of this position. Not only have they effectively prevented commercialization within the limits of the Reservation but they have exerted every influence to prevent legislation granting water rights. Failing in this, they appealed to the Attorney-General to take action, and agitated for the

repeal of such charters as were dormant. Their activities in the State culminated in the attempt to get a constitutional amendment. The ill success of their efforts in the State and the development of diversion schemes on the Canadian side gradually brought home the fact that, protection to be adequate would have to be international. Hoping to secure this, they turned to the federal government. Federal protection was secured, at least temporarily, through the Burton Act passed in 1906. In 1909 a treaty was finally negotiated with Great Britain which set a limit to diversion on both sides of the river. This treaty is, since the lapsing of the Burton Act, the law upon the subject.

It has been impossible within the narrow scope of this chapter to do more than indicate the nature of the activities of the Commissioners of the State Reservation at Niagara for the preservation of the Falls in the various spheres, local, state, national, and international, in which they have been interested. Enough has been said, however, to make it perfectly clear that their contributions in personal influence, through the public press, in their annual reports, in addresses made before committees and other public bodies have not been small. As a result of their efforts not only have objectionable grants been prevented or repealed, but publicity has been given, protective legislation secured, and the rights and duties of individual, state, and nation more clearly defined. It is not too much to say that in this work the Commissioners of the State Reservation have, in every case, supplied the initiative and borne the brunt of the battle. The existing status is itself the best evidence of the success of the unremitting struggle of the last thirty, and especially of the last ten or fifteen years. The success that has attended

the efforts of the Commissioners is the more marvelous when one considers that they had no power outside of the Reservation but that of protest. To be sure, the battle is not yet done, but enough has been won in the education of public sentiment alone to make it impossible that the wheel of time should ever go back to the point at which it was in 1886, the power interests to the contrary notwithstanding. Of course, even the *status quo* will not maintain itself; eternal vigilance is still required to preserve the integrity of the Falls and this vigilance the Commissioners stand ready to give.

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## CHAPTER VII

### THE EXISTING POWER SITUATION--THE EFFECTS OF DIVERSION

As has been pointed out in the previous chapter, the waterways treaty with Great Britain is, since the lapsing of the Burton Act on March 4, 1913, the sole limitation upon the diversion of water from the upper Niagara River and the ultimate legal protection of the Falls. The Burton Act has, however, so recently ceased to be operative that it is impossible adequately to discuss the existing situation without taking account of it. In this chapter we accordingly propose to discuss the situation as it was under the Burton Act and to note, as far as possible, the results which have attended the lapsing of that Act. To give a complete view of the amount of diversion which is taking place it will, of course, be necessary to consider not merely the American power development but the Canadian grants as well. We take up the American situation first.

The area available for power purposes on the American side is strictly limited owing to the fact that the State Reservation occupies a mile and a quarter of river shore which would otherwise probably be given over to power plants. To be sure, attempts have frequently been made by various power interests to gain a foot-hold on this territory, but they have been unsuccessful. There is absolutely no diversion for commercial purposes within the bounds of the State Reservation. The two companies now operating on the American side—the Niagara Falls Hydraulic Power and Manufacturing Company and the Niagara Falls Power Company—are both outside the limits of the Reservation.

The Niagara Falls Hydraulic Power and Manufacturing Company takes its water through a canal extending from Port Day, about a mile above the Falls, through the city of Niagara Falls to the brink of the gorge below the Falls where are situated its three power houses. The water rights of this company are, by State grant, limited to the capacity of the canal just mentioned which is 100 feet wide and fourteen feet deep. The precise amount which can be so diverted has never been accurately determined, or, if so determined, has never been made public. The amount allowed to the company by the Secretary of War under the Burton Act was, however, 6,500 cubic feet per second.

The other company diverting water on the American side is the Niagara Falls Power Company, situated above the intake of the Hydraulic Power Company at Port Day. This company has a charter right to divert water enough to produce 200,000 effective horsepower. The water for this purpose is obtained through a canal communicating with penstocks in which are located the turbines which produce the power. The "dead water" passes by a tunnel approximately 7,000 feet long to the gorge of the river below the Falls. The two power houses now in operation produce 110,000 horsepower and will produce more when the new turbines are installed. The water necessary to produce this power has, under the Burton Act, been put at 8,600 cubic feet per second. To produce the remainder of the 200,000 horsepower to which the company is entitled by the terms of its charter will require approximately as much again.

The amount which these two companies have, under their charters, the right to divert is greatly in excess of the amount permitted by the Burton law and the treaty. That the Burton law was an effective restriction is best evidenced by the fact that as soon as the law lapsed the power companies immediately increased their capacity

to the limit allowed by the treaty. The effect of the treaty is shown by the efforts of the companies to get larger returns from the water which they are diverting. To this end new turbines of at least a fourth greater efficiency are gradually being installed by the power companies.

As said, there are two power companies actually in operation on the American side. Two other companies<sup>1</sup> which, while not operative, yet claim rights under old charters granted by the State of New York. There is, of course, no room for development under these as long as the treaty limits remain and the existing companies remain in operation. There is some question as to whether the rights conferred by these charters are still in existence, a matter which can only be settled by legal adjudication. Neither of the companies in question is at present engaged in any work looking to the diversion of water.

On the Canadian side of the river there are four corporations in operation which have been authorized by the government of Ontario to divert water for power purposes. The Canadian Niagara Power Company has the right to develop 100,000 horsepower, which, it is estimated, requires the diversion of 9,500 cubic feet per second. The Ontario Power Company has two rights — one to carry water through three main feeder pipes eighteen feet in diameter to a power-house situated below the Falls, and the estimate given of the amount of water which will be diverted by these three pipes is substantially 12,000 cubic feet per second. This company has also a right to conduct water from the Welland River which flows into the Niagara River just above the Rapids, but the amount of water which can be abstracted under this

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<sup>1</sup>The Niagara Power and Development Company and the Niagara, Lockport, and Ontario Power Company.



permission has never been determined and may safely be omitted from any calculations made in this chapter. The Electrical Development Company has the right to produce 125,000 horsepower, and the estimated amount of water required to produce this maximum amount of power is 11,200 cubic feet per second. In addition to the foregoing, an electrical railway company has the right to divert 1,500 cubic feet per second in the operation of its road.

These are all the rights which have been actually granted by the government of Ontario up to the present time. That the possibilities of further diversion have been under consideration is shown by the fact that in the year 1903 an eminent hydraulic engineer was engaged by the government of Ontario to report upon the possibility of additional plants capable of generating electric power on a large scale with the waters of the Niagara River. The report in question suggested four additional plants between the Welland River and the Horseshoe Fall with a total water consumption of practically 30,000 cubic feet. How much can be done toward establishing these suggested plants depends somewhat upon the interpretation of the treaty. It is certain that all of them could hardly be established even under its most favorable interpretation. Lower Niagara River power development has also received consideration and a report on the subject has been compiled by the Conservation Commission of Canada. Diversion from this part of the river would not affect the Falls, it is true. It is interesting nevertheless for its possible effects on the lower Rapids. As yet no steps have been taken to develop power here.

The situation on both sides of the river may be summed up as follows, the figures being the number of cubic feet of water diverted from the stream each second:

Niagara Falls Hydraulic Power and Manu-

facturing Company .....	6,500
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Niagara Falls Power Company.....	8,600
Canadian Niagara Power Company...	9,500
Ontario Power Company.....	12,000
Electrical Development Company....	11,200
Electrical Railway Company.....	1,500
	<hr/>
	34,200
	<hr/>
Total .....	49,300
	<hr/>

This was the actual diversion for power purposes under the Burton Act. Since the lapsing of that act, as intimated above, the diversion on both sides of the river has been increased. The total diversion on both sides of the river is now probably approximately 56,000 cubic feet. And this increased diversion is due not merely to the difference between the amounts permitted to be withdrawn on the American side under the Burton Act and the treaty, but to the fact that the treaty puts no restriction on importation and so encourages diversion on the Canadian side by opening the market for power in the United States to Canadian electricity.

Having discussed the diversion of the waters of the Niagara River, we turn next to a consideration of the effects of that diversion. This is a very pertinent inquiry for the danger of the near extinction of the Falls as an object of scenic interest by the diversion of the waters of the river above them is very real. It has been very difficult to impress this unwelcome fact upon the minds of a people whose imagination has been stirred for generations by the tremendous volume of the cataract, and to whom the inexhaustibility of Niagara has seemed as certain as the limitless power of the sun to give heat and light. The fact, nevertheless, is that the volume of water in the river is a finite and measurable quantity. The flow has been measured for many years by the United

States Engineers Corps, and the average natural flow found to be 224,000 cubic feet per second, while the minimum flow, so far as observed, was 165,340 cubic feet per second. Our problem is to find out if possible what is the effect upon this amount of a diversion of 56,000 cubic feet per second, the limit set by the treaty.

The problem is not an easy one. It stands to reason that the volume of the Falls as a whole will be diminished exactly in proportion to the amount of water taken from the river above them. The determination of the relative effect of diversion upon each of the two Falls is a good deal less simple, depending as it does, very largely upon topographical features and the point at which water is taken. The topographical conditions affecting the Falls have been so generally overlooked in discussions of the effects of diversion that it will not be amiss to consider them at some length.

Just before reaching Niagara Falls the river flows westward. Here it turns to the northward. In the bend of the river the current is divided into two parts by Goat Island, and plunges over the precipice in two cataracts. One, the smaller, is called the American Fall, and the other, the Horseshoe Fall. The international boundary line passes through the Canadian Fall at the former apex of the Horseshoe, thus placing the American Fall, Goat Island, and about one-half of the Horseshoe on the American side of the line. It is clear from this that our sentimental and real interest is not confined to the American Fall.

The parting of the waters is at the apex of Goat Island, about three-fifths of a mile above the Falls. The point of division is about 750 feet from the American shore and 3,750 feet from the Canadian shore. If the cross-section of the river-bed were horizontal, the gradient equal, and the current parallel to the mid-stream line,

Goat Island would divide the volume in the ratio of one to five, giving the American Fall one-sixth and the Canadian Fall five-sixths of the water. But the river-bed is not horizontal. It dips toward the Canadian side, and at the Cataract the sill or rock edge of the Horseshoe Fall is ten feet lower than the sill of the American Fall. The force of gravity, therefore, also tends to aggrandize the Canadian Fall at the expense of the American. As a result of these conditions, it is estimated that the American Falls get only one-tenth of the volume of the river.

Three other factors of the physical situation must be mentioned in order to have a complete understanding of the relative effect of diversion upon the Falls. First, there is the shape of the channels. The channel between Goat Island and the American shore is in the form of an inverted funnel, the narrow end being up stream. This means that the small proportion of water which it receives enters through an opening about 750 feet wide and is then spread out thinly over a crest line 1,060 feet long. On the Canadian side, on the contrary, whatever concentration there is occurs at the Falls end of the channel.

The direction of the current of the river must also be reckoned with. This, as it happens, tends toward the Canadian side before reaching the bend of the river.

Another factor which must not be forgotten is this: that from near the head of Goat Island to the Canadian shore there is a line of breakers at the beginning of a rapid descent in the Canadian channel. It is obvious that any water taken out below the head of these breakers will affect only the Horseshoe Fall.

Before going on to consider the effects of diversion as shown by the figures, it should be pointed out that the two American plants now in operation both take their water from the stream above the Rapids and therefore no doubt use to some extent water which would other-

wise flow over the Canadian Fall. Just what the effect of this diversion would be cannot be stated. Indeed, it is quite safe to say that the effect of taking a limited quantity of water from the stream above the Rapids at any given point of diversion cannot be calculated with accuracy. The Canadian plants, on the other hand, divert their water from the stream below the head of the Rapids and below the line of breakers mentioned above. It is apparent that taking water from below this cascade will not divert water to any appreciable extent, if at all, from the American channel. Hence, all the power plants now authorized upon the Canadian side do not by their diversion affect the American Fall, but only the Horse-shoe Fall.

To turn now to the figures. The natural average flow of the stream is 222,400 cubic feet per second. Of this amount about 22,000 cubic feet would pass through the American channel and 200,000 cubic feet through the Canadian channel. The authorized diversion through this latter channel below the head of the Rapids is 34,200 cubic feet per second, or about one-sixth of the total average flow through the channel. It should be remembered in this connection that, while the authorized abstraction is a fixed quantity, the flow of the river varies considerably. Taking its minimum flow as a basis the authorized diversion in the Canadian channel is one-fifth of the flow through this channel. These figures show how absolutely definite is the volume of the Falls and furnish interesting commentary on the popular notion of the inexhaustibility of Niagara.

The effect of taking water from the river above the head of the Rapids cannot be so accurately calculated. The average flow through the American channel at the minimum stage is about 16,500 cubic feet per second. But it must be remembered that the entrance to the channel at the head of Goat Island is only a little over

700 feet in width, while the length of the crest of the fall is 1,060 feet. The result of this is that even a slight reduction in the depth of the water at the entrance to the channel will seriously affect the appearance of the volume of water flowing over the crest of the American Fall. No accurate survey of the channels of the river sufficient to determine the effect upon the American Fall of diversion upon the Canadian side has yet been made. It is certain, however, that even at the maximum flow of the river the appearance of this Fall is seriously affected. Few photographs have been taken at low water, but those in existence demonstrate that the majesty of the American Fall and of the Rapids above it is practically annihilated with the water at the lowest observed stage. As to the apparent effect of diversion on the Horseshoe Fall, it must be borne in mind that in 1890 the width of the Horseshoe Fall was 3,010 feet and that owing to the natural erosion and recession, and the filling in 1904 and 1905 by power companies, the crest line is reduced to approximately 2,500 feet and the water flow is practically confined to 2,300 feet as there is little water going over 200 feet on the American side of the Horseshoe Fall, while the average depth at the crest now is 9.8 feet and at the deepest place about 12 feet. This condition is apt to mislead a casual observer as to the real and serious effect of the diversion.

So far the discussion has been confined to the effects of diversion of water from the Niagara river at or near the Falls, and no account has been taken of the large withdrawals made on the Lakes for canal and drainage purposes. While the total diversion through the Chicago Drainage canal and the Erie and Welland canals is of much smaller volume than that abstracted at Niagara Falls, the effect seems to be much greater. Official records show that Lake Erie has already been lowered from three to four inches by the combined diversion of

the three canals mentioned, while the much greater diversions at the Falls have reduced Lake Erie levels only about one and one-eighth inches. It would seem, therefore, that a small diversion made directly from Lake Erie or Lake Michigan produces greater effects than a larger volume abstracted nearer to the Falls.

One of the most interesting features of the present situation is the change in attitude toward the power companies. There has, of course, long been a feeling that the State ought to receive compensation for its power grants. It is not surprising, therefore, that the Attorney-General should recommend the advisability of imposing a special franchise tax upon the franchises received, or upon the profits of the companies, until a consistent policy shall have been formulated by the State for dealing with the surplus waters of navigable streams.

This change in attitude is, however, not due to economic considerations merely. There is a growing feeling that the waters of the State are public property and that the people should be the beneficiaries of the power developed from these waters. It was with some such thought, no doubt, that Secretary of War Stimson asked the House Committee on Foreign Affairs to amend its bill on diversion from the Niagara river so that preference would be given to municipal and public service corporations rather than to private users.

The same note of responsibility on the part of the State and regard for the public interests appeared measurably in Governor Sulzer's opposition to the re-enactment of the Burton bill. In an open letter to Congressmen, urging the defeat of the measure, he said in part:

"It [the bill] gives the State no voice in choosing the grantees of the power privileges, or in fixing compensation therefor. It lets other States share in water powers coming from, and belonging to, New York alone. It enables the Federal gov-

ernment, without hindrance from the New York authorities, to perpetuate the water power combination or monopoly at the Falls, and tends to impede any State-wide plan of State development or operation of a hydro-electric system for the benefit of our people."

This feeling that the State is responsible for the conservation of the waters of the State and for their use for the public benefit has developed into a demand for more efficient use of the water now being diverted. Secretary Stimson, in the recommendation to the House Committee already referred to, held that the present diversion should be handled with the greatest efficiency. It has been pointed out by the State Conservation Commission that the power companies at Niagara Falls are now getting only ten horsepower per second, whereas they might by proper development get twenty-four. The Commission holds that this means that fourteen horsepower is wasted, in other words, that the companies are not developing the property as they should and not serving the people as they might. The Commission contends, therefore, that the State should step in and compel these companies to carry out the provisions of their charters or else accept revocation.

The various arguments which have been quoted or referred to serve to show the uncertainty of the existing situation and demonstrate the need of some definite policy, state and national, in regard to water diversion. Before the controversy is over it will, no doubt, be clearly established not only what are the rights of the State as against the federal government, but also what are the obligations of the power companies toward the public. Meanwhile it is a very promising sign that the demand for conservation of the State's water supply and for efficient public service from the power companies continues to grow.



## CHAPTER VIII

### LEGAL QUESTIONS WHICH HAVE ARISEN IN CONNECTION WITH THE DIVERSION CONTROVERSY

Among the most interesting of the legal questions which have arisen during the history of the State Reservation at Niagara are those growing out of the diversion of the waters of the Niagara river for power purposes. The problems which have come up in this connection are entirely new, for the diversion of rivers and lakes is a new proposition. As commerce increases and the development of electrical power proceeds, these questions will, without doubt, be of even greater importance than at present, not merely on account of their novelty, but because of the large issues incidentally involved. In the case of diversion on the Niagara, for example, not only has it been necessary to apply old principles to new conditions, but the whole question of the division of powers between State and nation has had to be met and the rights of the individual against both determined. The questions which have actually arisen may be roughly divided into (1) those having to do directly with the rights of the power companies as against the State; (2) those arising in connection with the waterways treaty with Great Britain and the passage of the Burton Act, and (3) those which have arisen in consequence of the lapsing of the Burton Law.

In the first category belongs the controversy which grew out of the provision in chapter 513 of the Laws of 1892, conferring additional water rights and privileges upon the Niagara Falls Power Company upon the condition that the acceptance of the rights in question should bind the company to furnish, free of charge, electricity

for light and power and also water for the use of the State in the State Reservation at Niagara and the public buildings thereon, when requested by the Commissioners. This provision raised the whole question as to the effect of a charter conditioned upon the rendition of a service and is altogether one of the most interesting legal questions which has arisen in connection with the State Reservation at Niagara.

It appears, from a letter of Attorney-General S. W. Rosendale to President Green, of the Board of Commissioners, under date of March 12, 1892, that the implications of the act just referred to were clearly foreseen by the Commissioners while the act was pending as a bill before the Legislature. The probability that the conditions made in the act were likely to constitute it a contract between the State and the company were expressly recognized in an opinion handed down by the Attorney-General at the time. We quote:

“I am in receipt of your communication of the 8th instant, enclosing a copy of Senate Bill No. 295, entitled ‘An act with reference to the Niagara Falls Power Company,’ and containing the question: ‘Whether the acceptance by the company of the conditions named in the bill would constitute a contract between the State and the Company, which could not hereafter be rescinded or modified, as long as the Company performed its obligations under the act, namely, the supplying of light, water, and power, to the Reservation.’

“The Niagara Falls Power Company was incorporated by act of the Legislature, chapter 83, Laws of 1886. This was amended by chapter 109, Laws 1889 and chapter 253, Laws 1891. Under these laws the right of the Company to take water from the Niagara river extended from the east line of Lot 46, Mile Reserve to Port Day.

“By the pending bill, this right to take and use the waters of the river is extended ‘to all points opposite any riparian lands owned by said corporation, up to and including a part of Lot No. 49, Mile Reserve, (so-called) to the extent required for the proper operation of the authorized works of said corporation, during the continuance of said works; this right being granted upon the express condition that its acceptance shall bind the corporation to furnish free of charge electricity for light, for the use of the State in the State Reservation at Niagara, and the public buildings thereon, when and as<sup>\*</sup> reasonably requested by the Commissioners of said Reservation.

“In providing for a consideration to be given the State by the corporation, as a condition of granting the franchise, it will doubtless be claimed by the corporation, and, in view of decision, with much force, that a contractual relation was created, which puts it beyond the power of the Legislature to repeal the franchise without the consent of the corporation, so long as it performs the condition.”<sup>1</sup>

The bill became a law, this opinion notwithstanding. Immediately upon the passage of the bill, its provisions, including the contract clause, were accepted by the company as required, and formal notification of that acceptance was sent to the Secretary of State to be filed with the original law.<sup>2</sup> A communication to the same effect was sent to the Commissioners of the State Reservation, who, upon motion, laid it upon the table.<sup>3</sup>

At the time of the passage of the bill just discussed, the water for the Reservation was being supplied by the

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<sup>1</sup> Report of the Attorney General, 1892, Op., p. 106.

<sup>2</sup> Minute Books of the Commissioners, II, 233-234.

<sup>3</sup> *Ibid.*, II, p. 53.

Niagara Falls Water Works Company under contract with the Commissioners. This company was presently taken over by the Niagara Falls Power Company, which refused to render bills for water consumed on the Reservation and insisted on its readiness to furnish water free of charge under chapter 513 of the Laws of 1892.

The controversy ran all through the summer of 1894, the Commissioners holding that, under the law, a specific request on their part was required, and the company, on the other hand, arguing that the acceptance of the water was sufficient.<sup>4</sup> The matter seems to have rested until 1898, when the Commissioners again requested of the water company a bill for water furnished the Reservation.

On July 29, 1898, came the reply of the company to the following effect:

"In answer to your request we have no bill to render for water furnished for the use of the Reservation to June, 1898, as you are entitled to the use of such water free of charge, as provided in *Chapter 513, of the Laws of 1892*.

"We are ready and shall be pleased to continue the supply of water through the Niagara Falls Water Works Company free of charge as provided in the chapter above cited."

The subject was thereupon brought to the attention of Attorney-General Hancock who gave the Commissioners informal assurance that

"not only was there no further possibility of any establishment of contractual relation by the use of these rights by the Commissioners, but the Legis-

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<sup>4</sup> See letter by Mr. Welch to President Green, under date of August 15, 1894; also a letter of August 22, 1894, from Mr. Welch to the Niagara Falls Power Company, manuscript collections of the Commissioners on the State Reservation.

lature having provided for free light, water and power for the Reservation, it was the duty of the Commissioners to take advantage of such free rights."

In pursuance of Instructions received from the Board at a meeting held November 16, 1898, Commissioner Porter asked the Attorney-General for a formal opinion. No reply was made by Attorney-General Hancock, but the matter was taken up by his successor, Attorney-General Davies, who, under date of March 3, 1899, sent to Commissioner Porter the following letter: \*

"I think there can be no question of the right to receive a gratuitous supply of power, light and water from the Niagara Falls Power Company without thereby entering into any contractual relations with said company, and in my opinion, this would not in any manner affect the grant made to the said company by the State. If there has existed, or now exists, any question as to the validity of any grant made by the State to the Niagara Falls Power Company, the fact of the State Reservation at Niagara receiving light, power, and water from said company gratuitously would not have a tendency to validate any action taken by the State in the grant to the said company any right or benefit.

"In order to relieve you of any uncertainty . . . I have prepared a notice . . . which I think will fully protect both the State and the Reservation." <sup>5</sup>

The notice in question was to the effect that the Commissioners accepted the services of the Company

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<sup>5</sup> Manuscript collections of the Commissioners on the State Reservation.

“upon the distinct understanding and intention that the gratuitous receipt of power, light, and water as aforesaid shall not in any way be construed or considered as creating any contractual relations between the Board of Managers of the State Reservation at Niagara, and the Niagara Falls Power Company, or in any way to validate, affect, or modify, or otherwise change the present status of the affairs existing between the people of the State of New York and the Niagara Falls Power Company, but the privilege be in all things considered an abstract gratuity, absolutely divorced from any question, either legal or equitable, which has arisen or may hereafter arise between the people of the State of New York and the said power company.”

This notice was served upon the company, and, under date of June 1, 1899, elicited the following reply:

“Referring to the letter of the 4th inst. signed by Messrs. Porter, Dow and Kingsford as a majority of the Executive Committee, stating that the Commissioners have accepted the offer of this company ‘to gratuitously furnish said Board for the use of the State Reservation . . . power, light, and water,’ but accompanying such acceptance with certain conditions, I am directed to call your attention to the fact that the Niagara Falls Power Company has offered to furnish your Board, for the use of the State Reservation . . . power, light, and water, not ‘gratuitously’ but ‘free of charge,’ in compliance with the provisions of the Act, Chapter 513, of the Laws of 1892. In letters addressed to you under date of August 13, 1894, and July 29, 1898, . . . this company notified you that it was ready and would be pleased to continue to furnish

water through the Water Works Company, free of charge, as provided for by the Act above referred to.

"The Niagara Falls Power Company has furnished, and the Commissioners have received water for the Reservation without charge therefor, and now the Company notifies the Commissioners of its continuing readiness 'to furnish free of charge' electricity for light and also power, and also water, for the use of the State in the State Reservation. . . . and the public buildings thereon, when requested by the Commissioners . . . pursuant to the provisions of the said Act.

"It seems proper to call your attention to the fact that pending the passage of the Bill which became Chapter 513 of the Laws of 1892, the Hon. Andrew H. Green, President of your Board, called the attention of the Governor and the Attorney-General to the features of the Bill likely to constitute it a contract between the State and this Company. This probably was expressly recognized by the Attorney-General in his formal published opinion (See Report of the Attorney-General, 1892, Opinions, page 106) and nevertheless the bill became a law. Immediately upon the passage of the Bill, these provisions, including the Contract Clause, were accepted by this Company, and formal notification thereof communicated to the Secretary of State to be filed with the original law.

"I may be permitted respectfully to suggest that under these conditions the contract has already been concluded between this Company and the State itself, which it is not within the powers of your Honorable Board to qualify or disaffirm, although, of course, in your discretion you may postpone the date at which the State shall get the full benefit of its contract."<sup>6</sup>

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<sup>6</sup> Minute Books of the Commissioners, II, pp. 233-234.

Upon the receipt of this letter, the whole correspondence was referred to the Attorney-General with the inquiry whether, in view of the letter of the company, the Commissioners might still avail themselves of the right of taking water and electricity from the company under the Act

“without thereby creating any further contractual relations, other than those now existing between the State of New York and the Niagara Falls Power Company.”<sup>7</sup>

On October 30, 1899, Attorney-General J. C. Davies replied as follows:

“You will observe that this condition (supplying of light, power, water as per Act) is a continuing obligation on the part of the Niagara Falls Power Company, and the acceptance of the light, power and water by the Commissioners . . . would not in any way change the relations between the people of the State of New York and the Niagara Falls Power Company. There would be nothing in the use of the light, power or water that would in any manner establish contractual relations between the State of New York and the Niagara Falls Power Company. If any such relation exists it emanates from the law itself and not from the act of the Commissioners in accepting free of charge the light, power, and water of said Company.”<sup>8</sup>

Thus the matter rested until 1905, when the question was reopened in consequence of the installation of a plant for the use of electricity in lighting the Reservation and also for power in operating the inclined railway. It will be remembered that under the act referred to the Commissioners were entitled to free electricity from the com-

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<sup>7</sup> Minute Books of the Commissioners, II, p. 236.

<sup>8</sup> Manuscript collections of the Commissioners on the State Reservation.



pany. It was suggested by private counsel that if they should accept water and electricity free of charge from the power company that such acceptance might consummate a contractual relation between the power company and the State which did not then exist, and which might render the grant made to the power company in question irrevocable, notwithstanding the opinion of Attorney-General Davies which, as pointed out by the author in a review of the situation to the governor, was not at all exhaustive in its character. The question was accordingly submitted to Governor Higgins and Attorney-General Mayer.<sup>9</sup> We quote from the reply of Governor Higgins under date of July 10, 1905:

"I am of the opinion that it does not lie in the hands of the Commissioners of the State Reservation at Niagara to create or perfect a contractual relation by making use of this electricity and water, or to prevent the creation of such contractual relation by refusing to make use of it . . . It would seem that if any contractual relation exists, it exists by virtue of the obligation imposed upon the Company by the State to furnish electricity for lighting and power and water, and that the Commission has no control over the situation.

"It would, therefore, seem to me wise for the Commissioners to avail themselves of this privilege to obtain such electricity and water. If, however, the Attorney-General, disagreeing with his predecessors, should hold that it lies in the hands of the Commission to create or avoid the contractual relation, which would make the charter of the Power Company, or any portion of it irrepealable, I think

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<sup>9</sup> The correspondence between the author and the Governor and the Attorney General relative to this matter will be found spread upon the Minutes of the Commission, III, pp. 27-34.

that the Commissioners should not assume the responsibility of having made the right to use the waters of the Niagara River for the power purposes by the Power Company perpetual and irrevocable."<sup>10</sup>

This was in substance the position taken by Attorney-General Davies in the opinions already quoted.<sup>11</sup>

The reply of Attorney-General Mayer was no less interesting and decisive than the letter of the Governor just cited. The questions put to him by the author had been:

" 1. Will a request by the Commissioners of the State Reservation that the Niagara Power Company furnish electricity for light and power free of charge under the provisions of this statute (Chapter 513 of the Laws of 1892) and the furnishing of the same by the Company pursuant to such request, establish a contractual relation between the State of New York and the Company by reason of which the rights acquired by the Power Company under the Act in question will become irrevocable?

" 2. Will the acceptance by the Commissioners of such free electricity for light and power in any manner change the rights of the State as they existed after the passage of the Act but before such request for such electricity or the acceptance of the same? "

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We quote at length from the Attorney-General's opinion:

" The questions which you ask are interesting and involve principles which have been frequently before the courts in notable litigations.

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<sup>10</sup> *Ibid.*, pp. 31-32.

<sup>11</sup> *Supra.*

<sup>12</sup> Minute Books of the Commissioners, III, p. 28.

"Whatever rights the corporation may have under the statutes to which you refer are not in my opinion affected or connected with the request by the Commissioners of the State Reservation to which you refer.

"Under chapter 513 of the Laws of 1892, the right to take and use the waters of the Niagara River, as in the statute provided, to the extent required for the proper operation of the authorized works of the corporation during the continuance of such works, was not dependent upon a request of the Commissioners of the State Reservation for the furnishing of electricity free of charge.

"The Legislature granted the right. The Company could then accept or neglect the grant, but if it accepted it was bound to furnish, free of charge, electricity for light and power, upon the request of the Commissioners of the State Reservation, for the purposes and in the manner in the statute provided.

"In my view of the matter, therefore, it becomes unnecessary for me to express my opinion as to what, if any, contractual relation has sprung up under the statute between the State and the corporation, or what the effect of the reserved power, both in the Constitution and the original statute may be.

"The point is that the request of your Commission will not, of itself, establish any contractual relations between the State and the Company, nor will the acceptance by the Commissioners of free electricity for light and power in any manner change the rights of the State as they existed after the passage of the Act, but before such request for such electricity or the acceptance of the same was made.

"For the reasons above stated, I am able to answer both of your questions in the negative, and you may safely call upon the Niagara Falls Power

Company to furnish electricity for light and power, free of charge, pursuant to the provisions of Chapter 513, Laws 1892.<sup>13</sup>

Having been thus decisively assured by both the Governor and the Attorney-General that it was perfectly safe to take advantage of the statutory provision, the Commissioners finally requested the company to furnish electricity for lighting the Reservation and the Administration Building and for operating the inclined railway.<sup>14</sup>

The history of the controversy with the Niagara Falls Power Company has been given at such great length, not only because the general legal question is a large and interesting one, but because the history of the case illustrates so well the caution of the Commissioners and their careful and conscientious regard for the interests of the State. There was every reason for caution in this case. The position of the Commissioners under the statute was really a very delicate one, as the author pointed out in his letter to Governor Higgins above referred to.<sup>15</sup> We quote:

“ You will perceive that it is the duty of the Commissioners to avail themselves of this free use provided that they do not thereby do any act to the injury or detriment of the rights of the State since thereby a large saving of expense will be made. On the other hand, in the present attitude of the controversy relating to the use of water from Niagara River, it seems to them that they should not, although clearly authorized so to do, do anything which can in any manner change the status of the State with reference to amending, limiting or abridg-

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<sup>13</sup> Report of the Attorney General, 1905.

<sup>14</sup> Minute Books of the Commissioners, III, p. 34.

<sup>15</sup> *Supra*, p. 156.

ing the rights of the power company, without instructions from the executive department. Opposing as they have done and as they will continue to do the diversion of the waters of Niagara River for power purposes, they are unwilling to do any act whatever which will place upon them the responsibility of having made any such diversion perpetual and irrevocable." <sup>16</sup>

The case just described touched upon the diversion question only incidentally. The matter came up directly also. As early as 1895 the Commissioners called the attention of the Attorney-General to the general question of diversion. The opportunity to put the question concretely arose in consequence of the attempts of the Niagara Falls Hydraulic Power and Manufacturing Company to widen its canal without any legal warrant. President Green, of the Board of Commissioners, asked Attorney-General Hancock to define the rights of the company and, if necessary, take proceedings to stop the work. Under date of November 16, 1895,<sup>17</sup> the Attorney-General replied, reviewing the facts and the law, and making these four important statements:

1. That the company had no right to increase the capacity of its canal and could be restrained.
2. That the company had no right to divert any water whatever from the Niagara river and could be restrained.
3. That a diversion of water sufficient to diminish the flow over the Falls was a nuisance and could be restrained.
4. That the nuisance could be abated at the suit of the Attorney-General.

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<sup>16</sup> Minute Books of the Commissioners, III, p. 31.

<sup>17</sup> Report of the Attorney General, 1895, Op., pp. 322-329.

In the opinion it was pointed out that "the Niagara River is a public, navigable stream, to the bed of which and the waters flowing over it, the State, and not the riparian owner, has title." The opinion recognizes the common law right of the riparian owner to divert the water for his personal uses, but denies that this includes the transmission of power to lands of non-riparian owners. Moreover,

"the State could unquestionably deprive the corporation of all use of the waters of the river for power purposes, by devoting the stream to other public use . . ."

Taking up the question as to whether this had been done in the case of the Niagara river to an extent that would prevent the diversion of the water above the Falls for power purposes, the Attorney-General goes on to say that

"the objects and purposes of the statutes creating the Niagara Reservation were to preserve a great natural waterfall and its environments for the enjoyment of the people of this State. In fact, the statutes themselves declare that the Commissioners shall take all proper steps to restore and afterwards preserve the scenery as nearly in its natural state as possible.

"The flow of water over the Falls is an essential element in the preservation of the scenery, and if it can be shown (as I am informed it can) to be the fact that the diversion of the large quantities of water through the canal of the Niagara Falls Hydraulic Power and Manufacturing Company has a diminishing effect upon the flow of the water over the

Falls, the diversion is a nuisance and can be restrained."

This was the first opinion on the general question of diversion, the first opinion in which the issue was presented singly. By insisting that the establishment of the Reservation was the devotion of the waters of the river to a public use, it clearly connected the Reservation with the general question of water diversion. Most important of all, is pointed out a new remedy, viz., suit brought by the Attorney-General. It is true that the Attorney-General never sought an injunction to restrain the company in its operations and that the company succeeded in getting from the Legislature an act confirming its claim.<sup>18</sup> But the very fact that confirmation of the rights in question was considered advisable was a victory for the Commission, for it was in effect a recognition of the contentions made by it and upheld by the Attorney-General.

The opinion of Attorney-General Hancock just discussed was, unfortunately, not exhaustive. It waived the question as to the effect upon water rights of actual ownership of the bed of the river. This came up later in the case of the *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company vs. Smith*, in which it was held that the company, by virtue of its ownership of the bed of the Niagara river, was entitled to the use of the waters flowing over the portion of the bed of the river belonging to it as a corporeal hereditament independently of any legislative grant.<sup>19</sup>

The most recent opinion on the rights of the power companies occurs in a report of Attorney-General Carmody made to Governor Sulzer under date of April 3.

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<sup>18</sup> Laws of New York, 1896, chap. 968.

<sup>19</sup> 70 App. Div. 543; 175 New York 469.

1913. Speaking of the rights of the Niagara Falls Hydraulic Power and Manufacturing Company, the Attorney-General says:

“I believe this diversion cannot be legally made as a riparian owner. As such owner the company may have the right to use the water in front of its property for power or other purposes. But I do not think the right, if it exists, justifies the diversion of the water from the river as it is diverted by the canal used by the company, notwithstanding the fact that the water is returned to the river below the plant of the company.

“In addition to its riparian rights, however, this company secured from the Legislature in 1896 (chapter 968) an act recognizing and confirming the right of the company to take, draw, use and lease and sell to others the waters of the Niagara River for domestic, municipal, manufacturing, fire and sanitary purposes, and also to develop power therefrom for its own use and to lease and sell to others to use for manufacturing, heating, lighting and other business purposes; the quantity being limited and restricted to such amounts of water as may be drawn by means of the hydraulic canal of said company, which canal is sufficient to carry at all times a maximum uniform depth of fourteen feet of water. This act, however, provides that the rights therein granted and conferred shall not impair the practical navigability of the Niagara River. This act recognizes an existing right, but limits its exercise. It does not in express terms undertake to grant any right or powers to the company in addition to those heretofore appurtenant and exercised as riparian owner.

“I believe, therefore, that whatever rights the company now has to divert water from the Niagara



River, without passing upon the validity, at this time, of the permits issued by the Secretary of War under the Burton Act, must be justified by its riparian ownership and not by any grant from the Legislature."

In regard to the Niagara Falls Power Company's riparian rights, the opinion holds that these

"would not justify the diversion of the water out of the bed of the river to the distance that it is now diverted, notwithstanding the fact that it is afterwards returned to the river. The company must, therefore, be prepared to justify its use of the water under the legislative grants mentioned and under the permits issued by the Secretary of War."

It will be seen from this opinion that the rights of the power companies are seriously under discussion. The opinion is strong in some quarters that companies using the waters of the Niagara river without compensation may be restrained from so doing and their charters rescinded. This is, of course, a matter for the courts to decide.

So much for the rights of the corporations against the State in the use of the waters of the Niagara river. We turn now to the far larger question of the legal status of the Niagara river, a discussion often invoked since the question of diversion has come into national, not to say international, prominence, and very thoroughly discussed during the agitation for the passage of the Burton Bill and the campaign for international protection.

The Niagara river is in some respects unique in character. It differs from most rivers of its size in that it simply connects Lake Erie with Lake Ontario, or, as some one says, "carries the discharges of the four great lakes

into the fifth." Its greatest distinction, of course, is the fact that it contains the Falls. It has the additional importance that through it runs the boundary line between the United States and the Dominion of Canada. The question of the legal status of the river is therefore one of international as well as of municipal law. It is not our purpose in this chapter exhaustively to discuss the legal status of the river, but merely to outline in the briefest way the legal and constitutional questions which were raised in the course of the efforts to pass the Burton Act and to secure the treaty with Great Britain. To this end we shall consider first, the general legal character of the stream, and then, the effect of that character upon the rights of the individual, the State, and the United States respectively.

As already intimated, the Niagara river has a distinctly public character due to the fact that it is a boundary stream. As such it is governed by the rules of international law and is subject to the joint jurisdiction of the two nations whose territory it separates. At municipal law the Niagara river is a striking example of the non-applicability of the common law rule which limits navigability by the ebb and flow of the tide. In the United States, as is well known, navigability in law is synonymous with navigability in fact. In the case of the Niagara the fact has been generally conceded.

The public character of the river as determined by its navigability and its position as a boundary stream being sufficiently clear, we turn to the second part of our inquiry, viz., the consequences of this public character so far as the rights of the individual, the State, and the United States are affected thereby.

First, as to the rights of the riparian owner: This subject came up very concretely in the proceedings for the acquisition of the Reservation. To quote from the first annual report of the Commissioners:

“On the trial before the Commissioners of Appraisalment, it was claimed by the proprietors of the islands and of riparian lots that they owned the bed of the Niagara River; and independently of this, that they had a right to use, without stint, the power afforded by the Rapids and the Falls for hydraulic purposes; and they claimed that they should be compensated for the value of this vast water power, even where it had not been reduced to use. Upon this basis, they were prepared to present claims aggregating twenty or thirty millions of dollars. After full argument and careful consideration, the Commissioners of Appraisalment rejected all such claims, except where the water power had been actually reduced to use and used for a period long enough to create a prescriptive right. They hold (1) that Niagara river is a public stream and its bed and waters belong to the State (2) that as against the State, private riparian owners have no right to encroach on its bed to divert its waters or to subject them to the burden of manufacturing uses, unless they have acquired such rightly grant from the State or by prescription.”<sup>20</sup>

The question as to the rights of the riparian owner has come up since then in connection with the claims of the power companies to divert water from the river. The matter was very ably discussed from the point of view of the power companies at the hearings held by the Rivers and Harbors Committee while the Burton Bill was under consideration.<sup>21</sup> Although there was, apparently, some doubt as to just what the equitable rights of the companies might be as against the State and the United

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<sup>20</sup> Annual Reports of the Commissioners of the State Reservation, I, pp. 6-7.

<sup>21</sup> Fifty-ninth Congress, First Session, H. R. 18024, p. 29.

States, there seems to have been no question as to the general principle involved. It was freely conceded even by the power companies, that, while riparian owners along banks of public, navigable streams may have certain vested or valuable rights to the use of the stream, these rights are subject to the paramount right of the State to utilize the water of the stream for the public use and to the paramount right of the Federal Government to control the waters thereof in the interest of interstate and foreign commerce. Of course, where an actual fee in the bed of the river has been acquired from the State, the right to the use of the water becomes an incorporeal hereditament. But even this is subject to surrender for the public purposes of navigation and in the interests of interstate and foreign commerce.

Next as to the rights of the State. It is familiar law that the shores of navigable rivers and streams and the lands under their waters belong to the State in whose territorial limits they lie. To put it another way, the State has title to all the navigable waters within its borders, subject only to the jurisdiction of Congress for the regulation of commerce. The acts of the State are conclusive until Congress sees fit to act. When Congress, however, once asserts its control over navigable water, the acts of the State must give way.

Summed up in the fewest possible words all this means that, as between the State and the United States, the State has title to the soil and waters of public navigable rivers, while the United States has jurisdiction.

It being clear (1) that the Niagara river is a public navigable stream, (2) that, in the case of such streams, the riparian owners have no title as against the State, and (3) that, as between the State and the United States, the State has title to the soil and waters, the United States the jurisdiction, we are ready now to examine a little

more carefully just what is implied in the last and how far it extends.

The rights of the United States to jurisdiction over the Niagara river must be sought in the constitution. Examination of that instrument shows that the only clauses upon which it can be based are the commerce clause, that conferring admiralty and maritime jurisdiction, and the treaty-making power. As already pointed out, the Niagara river is actually navigable for most of its length. It does not matter whether commerce is really carried on over its waters between New York and Canada or not, so long as commerce may be so carried on. Moreover, the power of Congress does not rest merely upon the right to regulate commerce, but

“upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the constitution was adopted.”<sup>22</sup>

While the general principles governing are clear enough, matters are somewhat complicated in the case of the Niagara river by the fact that the rapids and falls make that river unnavigable for at least a portion of its length. This fact was strongly urged by those who were opposed to the passage of the Burton Bill and has been urged since by those who favor State control. The Federal Government has met this argument by the counter claim that the rapids and falls are a part of a system and can not be considered separately. Whether a river is actually navigable, is of course for the courts to determine. They may not, however, say whether a given fact designated by Congress does or does not affect navi-

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<sup>22</sup> *Genesee Chief vs. Fitzhugh*, 12 How. (U. S.), 443.

gability. Once the fact of navigability is established the discretion of Congress is complete. In the case of the Burton Act, as was pointed out at the time, the power of Congress to protect navigability was used for the purpose of scenic preservation.

We have discussed the powers of the Federal Government under the commerce clause of the constitution and by virtue of its admiralty and maritime jurisdiction. We turn now to its rights under the treaty-making power. The constitution places no limits whatever upon the subjects, conditions, or contents of treaties. This is so well understood that it has never been questioned that, whatever interest New York may have in the waters of the Niagara river, the United States, in the exercise of its treaty-making power as a sovereign, can enter into an agreement with Great Britain to prevent the further diversion of the water of the upper river on both sides of the same.

In addition to the constitutional rights of the Federal Government which have been discussed there are other vaguer claims based not so much on the constitution as on considerations of general policy and inherent right. Thus it was pointed out before the Rivers and Harbors Committee that the right of Congress to control the diversion of waters from Niagara Falls need not rest in the slightest degree upon the navigability of the river, that Congress had absolute control upon the ground that it is a boundary stream, a frontier river. Attention was called to the inherent power of every nation, even without any grant in the constitution, to protect itself at the frontier against what lies beyond. The power arises out of the right of self-defense.

“The nation has a right to say what may be done or what may not be done at its frontier on a boundary river in the interest of national protection

and defense, and the States and the citizens hold whatever they hold subordinate and subject to that paramount right, and it is not necessary that the nation wait until it is in the conflict of war to assert those rights; it has a right to assert them for the purpose of peace." <sup>23</sup>

In addition to this power based on the inherent right of self-defense, it would seem that there is also an obligation upon the United States to preserve national comity with Great Britain by the prevention of diversion. The national government is the only power in this country which can regulate this. The State of New York has no jurisdiction.

We have, then, besides the constitutional guarantees, these other propositions — first, protection to the national boundary which affords a national defense against foreign aggression; and, second, avoidance of international complications by undue diversion of the waters of a boundary stream; either of these propositions is sufficient to warrant the jurisdiction of Congress in the case of the Niagara river.

To summarize: The power of the Federal Government to prevent diversion of the waters of the Niagara river rests upon the constitutional provisions giving control of commerce and navigation, admiralty and maritime jurisdiction, and the treaty-making power. Besides these undoubted rights there are vaguer claims based upon the inherent right of self-defense and the obligation to prevent international complications, powers which belong to every nation by virtue of its sovereignty and are sanctioned at international law.

All this seems simple enough, but is in reality far from being so. Even where the rights were conceded it was

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<sup>23</sup> Fifty-ninth Congress, First Session, H. R. 18024, pp. 296-297.

hard to bring home the necessity for action. This was especially true of the treaty which was finally arranged between Great Britain and the United States. It was the privilege of the author to point out that the most immediate danger to the Falls threatened not so much from the American as from the Canadian side, and that for this reason, if for no other, national and international action was necessary.<sup>24</sup> The treaty secured, there was still the question as to the extent of the jurisdiction of the Federal Government under the constitution and in the administration of the treaty. As has been pointed out, the opposition made much of the fact that the part of the river from which diversion was made was in fact non-navigable and that the waters diverted were returned to the stream above the point where it again became navigable in fact. This contention was disposed of easily enough. The question as to the rights of the State and the nation in the stream was more difficult. It was claimed that while the river was a boundary river and the power privileges were the outcome of treaty, the power grants under the treaty were a matter for the State authorities to dispose of rather than the Federal Government. Governor Dix, of New York, voiced the State's rights argument in a letter to Senators Root and O'Gorman, in which he said:

"It is the contention of the State of New York that when the Federal Government has authorized the diversion of waters from a navigable stream for any purpose other than navigation, its power ceases, except for recalling the authorization and for determining that the authorized diversion is not exceeded. The determination of whether any part of the amount authorized by the Federal Government shall

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<sup>24</sup> *How to Protect Niagara Falls*, Outlook, January 27, 1906, Vol. 82, pp. 179-189.



be diverted, and to whom, rests with the State of New York."

The letter goes on to ask

"the recognition of the principle that the state of New York shall have exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters authorized to be diverted within the state by the treaty with Great Britain."<sup>25</sup>

Those in favor of State control also objected to the powers conferred upon the Secretary of War by the Burton act. The matter was very strongly put in a letter written to members of Congress by Governor Sulzer, Attorney-General Carmody, and Hon. George E. Van Kernen, chairman of the New York State Conservation Commission. We quote:

"We concede that Congress may empower the Secretary of War to permit the diversion of such water within the limitations fixed by the treaty, but we deny that Congress has the right to clothe the Secretary of War with power to determine the persons to whom, and the purposes for which such permits may be granted. We maintain that it is well settled by law that the title of the land under the waters of the Niagara River, to the boundary line, is held by the State of New York for the use of its people. This carries with it the right to regulate the use of the water, subject only to the paramount right of the Federal Government to control the sale for the purposes of navigation and national defense;

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<sup>25</sup> The *Albany Evening Journal*, April 6, 1911.

therefore, the State of New York should itself designate the beneficiaries of these water power privileges, and should control the use and operation thereof, so that the people of this State may enjoy the fruits of its own natural resources.

“This proposed act of Congress is no technical usurpation of Federal power, it is a plain case of an attempt to take away the property rights of the State of New York. The Federal Government, in the exercise of its rights over navigation, has by treaty determined the amount of water which may be diverted on the New York side, above the Falls of Niagara, without interfering with navigation. In other words, it has determined what surplus water belongs to the State of New York, for power development or otherwise. The proposed bill permits the Secretary of War to grant this same property away from the State of New York, to such person as he may determine, subject only to certain limitations or restrictions contained in the bill.”<sup>26</sup>

Of course economic considerations figured also in the opposition to Federal control, but these have been sufficiently discussed in another connection.<sup>27</sup>

It must not be supposed that controversy ceased with the lapsing of the Burton Act. New questions immediately arose, viz., Who controlled the 4,400 cubic feet per second by which the treaty exceeded the Burton Act, and what was the status of the power permits issued by the Secretary of War under the Burton Act? A committee of investigation was appointed by the Governor of New York and an opinion sought from Attorney-General

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<sup>26</sup> The *New York Post*, February 18, 1913.

<sup>27</sup> *Supra*, p. 147, chap. VIII.

Carmody. To quote from the Attorney-General's opinion:

"The title to the center of the Niagara River, both in the bed of the stream and in the waters that pass over it, is in the State of New York, subject to such rights as individual riparian owners may have, and subject also to Federal control in the interests of commerce, and for the purpose of protecting the navigation of the stream.

"I believe that Federal control under the constitution is limited to these two purposes, and that the Federal Government has not power to regulate the diversion of water for power purposes, or for any purpose other than that given it in the Federal constitution."

The Attorney-General then goes on to say that since the lapsing of the Burton Act

"there has been no Federal control of the Niagara River, unless the permits issued under the Burton Act are still valid, which I do not believe."<sup>28</sup>

United States Attorney-General McReynolds was also called upon to pass on the validity of the war department permits. He held that specific authority to control the diversion of water from Niagara Falls for power purposes was lost to the war department with the lapsing of the Burton Act on March 4, 1913, but that it did not follow that the Federal Government was now without power to exercise jurisdiction over the Falls under the waterways treaty with Great Britain. The opinion made it clear that the power to administer the treaty was in the hands

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<sup>28</sup> *The Niagara Falls Gazette*, April 9, 1913.

of the President. Thus it happens that President Wilson has under consideration the regulation by executive order of what was formerly accomplished by the Burton Act. This opinion fails to meet the New York State claim for complete jurisdiction over the water taken from the river under the treaty. Ultimately, no doubt, the question will be determined by the courts in legal proceedings brought by one side or the other.

The most recent question to be raised concerns the interpretation of the treaty itself. The Canadians are asking just what may be intended by the provision in the treaty to the effect that diversion for power purposes shall not exceed "in the aggregate a daily diversion *at the rate* of 36,000 cubic feet per second." The question is as to whether this means an average or a maximum diversion of 36,000 cubic feet. The matter is of some importance for on the decision depends, to some extent the possibility of further power development.

## CHAPTER IX

### THE MEN WHO HAVE MADE THE RESERVATION

It was the privilege of the author as a young man to know several of the distinguished men who composed the original "Commissioners of the State Reservation at Niagara" and it seems appropriate in this connection that something be said of them as individuals and of their public service in various directions. Each had attained distinction in public or professional life before coming to the Niagara work, and each by experience or temperament brought exceptional strength to the solution of the many problems of organization and administration that confronted the Board. The wisdom of their position on all questions they had to settle has appealed to their successors, and their decisions as precedents have aided greatly in the continued successful administration of the Reservation.

Andrew Haswell Green, for fifteen years president of the Commission, has been by far the leading and the large figure of the Niagara Commission. At the time of the organization of the Commission and his appointment he was sixty-five years of age, was in his full vigor and with broader experience in kindred work than any other man who could have been named. He brought to the work of the Commission in a marked degree all of those elements so necessary in organizing this, the first State Reservation to be established in a populous center, for the preservation of natural scenery and grandeur.

Mr. Green was born of Quaker stock at Green Hills, Worcester, Mass. (His ancestral home, a beautiful park of several hundred acres, he devised at his death to his native city.) He was early a teacher on the island of Jamaica; studied law in New York and in his twenty-

fourth year became the law partner of Samuel J. Tilden, who was five years his senior. With Mr. Tilden he entered at once into the political and ethical life of the metropolis. Through his long and varied activities he, like Mr. Tilden, remained a bachelor, and like him devoted much of his time to the public welfare. He was a leading spirit in the establishment of Central Park, being a member of Central Park Commission and its executive officer and president of the Board from 1856 to 1870, and later assumed its management under the title of Comptroller of Central Park. He was comptroller of New York city from 1871 to 1876. He conceived the plan of the "Greater New York" which became a reality in 1898; was chairman of the Commission under the act of 1890 and became known as "The Father of Greater New York."

He was an original trustee of the New York Public Library, the first suggestion of the consolidation of the Astor, Lennox and Tilden foundations having come from him. Among other projects he was a prime mover in the American Scenic and Historical Preservation Society, the Zoological Garden, the Museum of Art and Natural History, and all these organizations were assisted by his efforts. As an illustration of Mr. Green's appreciation and love of natural wonders, it is interesting to know that he purchased Watkins Glen a short time before his death, with the purpose of preserving it for the public use, and it was later purchased by the State of New York from his heirs at its actual cost to him.

At Niagara there were many propositions and counter propositions passing between the Commissioners and settled by them. Mr. Green at a meeting of the Commissioners held September 9, 1885, had stated a policy to be pursued in the administration, and to any infringements or variation of this he objected strenuously and with fixedness of purpose. The other Commissioners, realizing the

wisdom of Mr. Green's policies, aided him with all their talents and influence. His grasp upon the affairs of the Reservation was such that subsequent appointees for some time left the administration practically to him, and his orders and directions to the Superintendent became equivalent to the action of the Board. This condition continued until 1898, when at the suggestion of Mr. Green an executive committee was appointed. During the remainder of his administration and up to the time of his death in 1903, the executive committee was active with him in interest and management, and he at all times commanded the profound respect and veneration of its members. The State Reservation owes much to Andrew H. Green.

William Dorsheimer was the second president of the Niagara Commission. His service extended from January, 1883, until his death in March, 1888. Mr. Dorsheimer was a native of New York State and was about fifty years old at the time of his appointment. His activities had been varied and broad. He was a lawyer of New York city at the time of his appointment; was a major on the staff of Gen. John C. Fremont; was the owner and at one time active editor of the *New York Star*; was a magazine writer and in 1884 wrote a biography of Grover Cleveland. He was lieutenant-governor of the State of New York during the gubernatorial term of Samuel J. Tilden.

While residing in Buffalo Mr. Dorsheimer was one of the founders of the Buffalo Fine Arts Academy and of the Buffalo Historical Society, and in the summer of 1858 he began to incite among a few public-spirited citizens a movement toward the creation of a proper park system. This agitation resulted in the organization of a Park Board to which were appointed Mr. Dorsheimer, Mr. Pascal P. Pratt, afterward one of the Committee of Appraisal at Niagara, and Mr. James Mooney, later a Niagara Commissioner. Mr. Frederick Law Olmsted,

architect in chief of Central Park, New York city, was the architect employed. This indicates one of the early groupings of men afterward associated at Niagara. Mr. Dorsheimer died at Savannah, Ga., in 1888.

Martin Brewer Anderson was president of the University of Rochester at the time of his appointment as a Niagara Commissioner and was seventy years of age. He was a member of New England stock; was a graduate of Waterville College (now Colby University) where he afterward occupied the chair of Rhetoric and, also, Modern History. He later acquired the *New York Recorder* (a religious paper) and was its editor, leaving that work in 1853 to become the first president of Rochester University, which under his direction stood for the idea of a practical education. He was for thirteen years a member of the New York State Board of Charities, where he served with the late William Pryor Letchworth, the donor to the State of Letchworth Park. In one of the writer's visits to Glen Iris, Dr. Letchworth pointed to a stately white oak tree occupying a commanding position on the grounds and said:

"That oak was planted years ago by a former Niagara Commissioner, Dr. Anderson, and it typifies his noble and commanding character."

Dr. Anderson was a member of the Cobden Club; was associate editor in the preparation of Johnson's "Encyclopaedia" and contributed a vast number of articles to periodicals; was an LL. D. of the University of New York. He died in 1890, devising his property to Rochester University.

Sherman Skinner Rogers was born in New York State, of New England stock, and was fifty-five years of age when appointed as a Commissioner. At the time of his service as a Niagara Commissioner he was the senior member of the Buffalo law firm of Rogers, Locke & Mil-



burn. He had been a State senator, and president of the Civil Service Reform Association of Buffalo and was a member of the executive committee of the National Civil Service Reform League and was at one time president of the Buffalo Fine Arts Academy. He was known as a keen, logical and well versed lawyer, was a fluent and graceful speaker, a writer of charming literature and a connoisseur in music and painting. He died March 23, 1900.

J. Hampden Robb was less than forty years of age at the time of his appointment to the Niagara Commission. He was the son of a New Orleans banker and was himself a banker in New York city; was a member of the New York Assembly in 1882, and senator in 1884 and 1885. In the Legislature he was one of the foremost advocates of the law creating the State Reservation, and took a leading part in securing the appropriation for the purchase of the property. In 1887 he was appointed a commissioner of Parks of New York city and became president of the Park Board in 1888, when he further distinguished himself by his stubborn opposition to any invasion of lands set aside to be the green places of that city. In commenting on his service, a newspaper said twenty years ago:

“Only by eternal vigilance can the parks be maintained and developed as they ought to be, for there is never a time when some one is not trying to ‘work’ something to his own personal advantage and to the detriment of the public. If he can’t work it he makes a terrible hullabaloo and abuses the Commissioners. Mr. Robb withstood all these jobs, big and little, and has endeavored to have the parks administered so that the people of New York can get the greatest possible enjoyment and benefit out of them.”

Mr. Robb died in 1911.

As closely related to the first Board of Commissioners, Superintendent Thomas V. Welch of Niagara Falls deserves special mention. Superintendent Welch was born in Canada of Irish stock and was thirty-five years of age when appointed to the superintendency at the organization of the Board. In this position he served acceptably until his death in 1903, just a few days before that of his long time friend and associate, President Green, who was the victim of an insane assassin. Mr. Welch was educated in the public schools of Niagara Falls. He was for some time local freight agent of the New York Central Railroad and at the time of his appointment was a dry goods merchant. He was a member of the New York Assembly and in that capacity had charge of the bill for the establishment of the Reservation. He was for some years president of the Niagara County Savings Bank and a director of the Niagara Falls Power Company. He was a man of lovable character and charming manners and was a rare Irish orator. He was a capable superintendent and enthusiastic over all things at Niagara. He was devoted to President Green and in all matters carried out the wishes and policies of the Commissioners. He enjoyed great personal popularity and locally was regarded as almost an integral part of the Reservation.

The past fifteen years at Niagara have been marked by the development of electrical energy and the aggressions of the power companies, and later by a tremendous public sentiment for the preservation of this masterpiece of natural grandeur. In the last movement the Commissioners as representatives of the State, the trustees for the world, have naturally taken an active and leading part. It has been the privilege of the author to serve during this time with men who have unitedly, diligently and unflinchingly worked for the preservation of the property intrusted to their care. The names of

these men are: George Raines of Rochester; Thomas P. Kingsford of Oswego; Alexander J. Porter of Niagara Falls; Alvah K. Potter of Lockport; William B. Howland of New York; Eugene Cary of Niagara Falls; Thomas W. Meachem of Syracuse.

The success of the policy of the Niagara Commission is an instance of the efficiency obtained by vesting full administrative control in men whose uprightness and capacity have been already proved beyond question and who have not risen by political methods. The salaried officers have been efficient and faithful, and the employees have been earnest co-workers. Many of the employees are Civil War veterans who hold their positions until disability has overtaken them, and one police officer, Jacob Anthony, has been in active daily service since the establishment of the Reservation.

The following is the list of Commissioners and officers with the term of service of each:

Commissioners.	Confirmed.	Retired.
Andrew H. Green of New York.....	May 2, 1883	Nov. 13, 1903*
William B. Dorsheimer of Buffalo.....	May 2, 1883	Mar. 26, 1888*
Martin B. Anderson of Rochester.....	May 2, 1883	May 11, 1888
J. Hampden Robb of New York.....	May 2, 1883	Nov. 10, 1887†
Sherman S. Rogers of Buffalo.....	May 2, 1883	May 11, 1888
John M. Bowers of New York, to succeed Wm. B. Dorsheimer.....	May 11, 1888	Mar. 25, 1898
James Mooney of Buffalo, to succeed J. Hampden Robb .....	May 11, 1888	Mar. 22, 1893
John Hodge of Lockport, to succeed S. S. Rogers .....	May 11, 1888	Mar. 22, 1893
William H. Watson of Utica, to succeed M. B. Anderson.....	May 11, 1888	Feb. 12, 1889†
Daniel Batchelor of Utica, to succeed Wm. H. Watson.....	Feb. 12, 1889	Dec. 12, 1893*
Robert L. Fryer of Buffalo, to succeed James Mooney .....	Mar. 22, 1893	Mar. 25, 1898
William Hamilton of Caledonia, to succeed John Hodge .....	Mar. 22, 1893	Mar. 25, 1898
George Raines of Rochester, to succeed Daniel Batchelor .....	Dec. 27, 1893	Nov. 22, 1908*

\* Died in office. † Resigned.

Commissioners.	Confirmed.	Retired.
Alexander J. Porter of Niagara Falls, to succeed John M. Bowers.....	Mar. 25, 1898	Dec. 21, 1901†
Thomas P. Kingsford of Oswego, to succeed Robert L. Fryer.....	Mar. 25, 1898	Incumbent.
Charles M. Dow of Jamestown, to succeed William Hamilton.....	Mar. 25, 1898	Incumbent.
Alvah K. Potter of Lockport, to succeed Andrew H. Green.....	Nov. 27, 1903	Jan. 30, 1907†
William B. Howland of New York, to succeed George Raines.....	Feb. 3, 1909	Incumbent.
Eugene Cary of Niagara Falls, to succeed Alvah K. Potter.....	June 11, 1908	Incumbent.
Thomas W. Meachem of Syracuse, to succeed Alexander J. Porter.....	Dec. 30, 1910	Incumbent.

President.	Elected.	Retired.
M. B. Anderson, Rochester.....	May 29, 1883	June 9, 1883
William Dorsheimer, Buffalo.....	June 9, 1883	Mar. 26, 1888*
Andrew H. Green, New York.....	May 26, 1888	Nov. 13, 1903*
Charles M. Dow, Jamestown.....	Dec. 22, 1903	Incumbent.

Secretary and Treasurer.	Appointed.	Retired.
J. Hampden Robb, New York.....	May 29, 1883	Nov. 22, 1883†
Leighton Williams, New York.....	Nov. 22, 1883	Jan. 1, 1887†
David Gray, Buffalo.....	Jan. 1, 1887	Jan. 30, 1888†
Henry E. Gregory, New York.....	Jan. 30, 1888	Jan. 31, 1899†
Richard F. Rankin, Niagara Falls.....	Jan. 31, 1899	Feb. 1, 1900†
Peter A. Porter, Jr., Niagara Falls.....	Feb. 1, 1900	Oct. 1, 1903†
Thomas V. Welch, Niagara Falls, as Secretary .....	Oct. 1, 1903	Oct. 20, 1903*
Edward H. Perry, Niagara Falls, as Treasurer .....	Oct. 1, 1903	May 23, 1910*
as Secretary .....	Dec. 22, 1903	
Clarence H. Atwood, Buffalo, as Treasurer .....	Aug. 10, 1911	Incumbent.
Harry K. Eckert, Buffalo, as Secretary..	April 16, 1912	Incumbent.

Superintendent.	Appointed.	Retired.
Thomas V. Welch, Niagara Falls.....	July 16, 1885	Oct. 20, 1903*
Edward H. Perry Niagara Falls.....	Dec. 22, 1903	May 23, 1910*
William E. Harries, Buffalo .....	Aug. 3, 1910	Apr. 16, 1912†
Harry K. Eckert, Buffalo.....	April 16, 1912	Incumbent.

\* Died in office.

† Resigned.

## CHAPTER X

### THE CANADIAN PARK

The parks on the American and Canadian sides are so intimately connected scenically and their origins are so closely associated that no history of Niagara Falls is complete without some notice of the Canadian reservation. This must be our excuse for the brief history of the Canadian Park which follows.

The origins of the Canadian reservation movement have been sufficiently indicated in our discussion of the establishment of the American Reservation. In that study we have endeavored correctly to apportion Lord Dufferin his share of the credit for the origination of the reservation movement. It has been pointed out that while he probably did not first suggest the Reservation idea or even start the Reservation movement, he did undoubtedly make the first public utterance on the subject, at the opening of the Provincial Exhibition at Toronto, and in line with the suggestion which he had made to Governor Robinson of New York in the summer of 1878, he made a strong appeal to the Ontario Government to set aside the lands around the Falls for the free use of the public and so prevent the vexatious annoyances to which visitors at the Falls were subjected.

Action, it will be remembered, was first taken on the American side. We have described the study made by Messrs. Gardiner and Olmsted and the report of the New York State Survey. In pursuance of the direction of the New York State Legislature, the Commissioners of the State Survey held a conference by appointment with the members of the Ontario Cabinet in order to interchange views respecting the project. At this conference maps showing the territory which it was proposed that the two

governments should expropriate were submitted and generally approved. The representatives of the Ontario Government expressed their entire sympathy with the park project; but it was pointed out that there were difficulties in the way of the undertaking, and the opinion was expressed that it was only reasonable that the cost of restoring the scenery on the Canadian side of the river should fall upon the Dominion Government, which claimed to have jurisdiction of a considerable portion of the lands proposed to be included in the park, and was, therefore, in a much better position than the Province to take up the work.

In conformity with this view of the matter, and in order to facilitate any action which the Government of Canada might be disposed to take in the premises, the Legislature of Ontario, in March, 1880, passed an act which conferred upon the Minister of Public Works of Canada, all the authority which the Provincial Government could give, to proceed with the execution of the project, should he so desire.<sup>1</sup> As, however, the Dominion Government did not avail itself of the provisions of the act in question, the Legislature of Ontario, after having waited for five years, and finding that there was but little prospect of action, finally determined to assume the responsibility and, on March 30, 1885, passed "An act for the preservation of the natural scenery about Niagara Falls."<sup>2</sup> Under the provisions of this act, authority was given to the Lieutenant-Governor to appoint a Board of Commissioners, whose duties were to select such lands in the vicinity of the Falls as would, in their opinion, be proper to acquire for the purposes of restoring the scenery to its natural condition, and to preserve the same from further deterioration, as well as to afford to travelers and others facilities for

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<sup>1</sup> 43 Vict., chap. 13.

<sup>2</sup> 48 Vict., chap. 21.

observing the points of interest in the vicinity. Authority was also conferred upon them to prepare surveys of the lands so selected, and to report as to the best means of appropriating, improving and preserving these lands for the purposes of a public park. In pursuance of this act, Colonel Gzowski, A. D. C., Messrs. John W. Langmuir, and J. Grant Macdonald were, on the 25th of April, 1885, appointed Commissioners. They immediately proceeded to the discharge of their duties, spending most of the rest of the year in making a careful inspection and survey of the territory which it was proposed to include in the projected park.

As on the American side, the purposes of the act, financial considerations, and natural topography were the determining factors in the selection of lands finally made. Nature had marked out on the Canadian side even more distinctly than on the American side the boundaries of the proposed park. The territory thus marked out may be described as follows: At a distance of about 300 yards from the edge of the river gorge and following the general direction of the river, there is a beautifully wooded escarpment rising over 100 feet above the general level of the plateau immediately adjacent to the gorge, and leading up to the general level of the table-land between the two lakes. This escarpment is clearly defined up to and beyond the head of the rapids, and it was decided that a better boundary could not be chosen to delimit the territory reserved for a park. The intention of the Commissioners was at first to include the whole escarpment, but the price set by the proprietors of the edge of the bluff being very high a line a little below the top of the escarpment was chosen instead. By this means the slope with its wealth of foliage was secured to the park, while at the same time all the commanding views from the table-land above were retained by the owners and their demands for compensation correspondingly reduced. A map of the

lands described having been submitted to the government with a recommendation for their acquirement, an Order-in-Council, approved by the Lieutenant-Governor, was passed on December 14, 1883, confirming the selection of the lands made.

Immediately following the approval of the selected properties the Commissioners were authorized to employ experts to value the lands, buildings, and improvements, and, if possible, arrange terms with the respective owners. The work of appraisal was completed in January, 1886. The total amount of awards together with arbitration expenses was \$436,813.24.

The Commissioners had then to devise a financial scheme for the payment of the same, and to provide funds for the improvement and maintenance of the park. After the most careful and exhaustive consideration of the subject the Commissioners recommended that the Government establish and maintain the park as the property of the Province with its management entirely under provincial control. The Commissioners further recommended that in order to procure funds for the purchase of the lands selected, and for the preliminary works of reclamation and improvement, the Government should authorize the issue of forty-year bonds bearing interest at 4 per cent. to the extent of \$525,000, principal and interest to be guaranteed by the Province, and to form a charge against the revenues of the park.

These recommendations received the approval of the Government, and the functions of the Commissioners appointed under the Act of 1885 were practically brought to a close by the acquisition of the park. In order, however, to give effect to the final recommendations of the Commissioners, the Government passed an act in the session of 1887 reappointing the Commissioners then holding office. Under the new act, as under the preceding act, the Commissioners hold office at the pleasure of the Lieuten-



ant-Governor in Council and receive no compensation. The act provided that lands already selected and approved by Order-in-Council, as well as all other lands that might be acquired, should be vested in the Commissioners as trustees for the Province and authorized them in their corporate capacity to issue and dispose of debentures not exceeding \$525,000, bearing interest at 4 per cent., and to apply the proceeds of their sale in payment of the lands and in making the necessary improvements, constructions, and appliances, etc., to be used in connection with the park.<sup>3</sup>

Pending the preparation of the bonds and their being placed on the market, the Commissioners arranged for a temporary loan, with which they paid for the properties of which immediate possession could be given. Successful sale of the bonds enabled the Commissioners to pay the awards and take possession of the various properties early in the summer of 1887.

The work of reclamation was immediately begun and pushed forward so rapidly that on May 24, 1888, the park was in fit condition to be formally opened to the public.

So much for the origin and establishment of the Canadian reservation, Queen Victoria Niagara Falls Park, as it is officially known. The lands originally set apart for the park included an area of about 154 acres and extended along the Niagara river a mile below and a mile and a half above the Horseshoe Fall. Besides this there was a water area of 317 acres. By filling in along the shore line and making artificial islands some fifty acres have been added to the land area of the park. In addition large areas have, since the establishment of the park, been acquired by grant or purchase. Thus it happens that at present the jurisdiction of the Commissioners extends over

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<sup>3</sup> 50 Vict., chap. 13.

an aggregate of some 1,178 acres, comprising a strip of land along practically the whole bank of the Niagara river from Lake Erie to Lake Ontario, with enlarged park areas at Old Fort Erie, Niagara Glen, and Queens-town. What started out as the Queen Victoria Niagara Falls Park has become the Queen Victoria Niagara Falls Park System and embraces sufficient territory to command not only the immediate surroundings of the Falls, but, in addition, nearly the whole reach of the Niagara river from Lake Erie to Lake Ontario.

It was decided at the very outset of the Park movement that it was advisable to follow the suggestion of Lord Dufferin and make the regulations on the Canadian side correspond as closely as possible to those which had been adopted on the American side. The ordinances in the two parks and the division of executive authority is accordingly very similar.

The Canadian park is administered by a board of seven Commissioners appointed by Order-in-Council and serving without compensation. The headquarters of the Commission are in Toronto and it is from here that all relations with the government are conducted. The powers of the Canadian Commissioners are not so absolute as those of the American Commissioners. On the Canadian side all plans, tolls, and by-laws are subject to the approval of the Lieutenant-Governor. The approval of the Lieutenant-Governor is necessary also for the appointment and removal of all park officers and employees. The immediate supervision of the park is in the hands of a superintendent appointed by the Commissioners and with offices on the ground. The superintendent reports to the Commission; the Commission reports to the Provincial Secretary of the Province of Ontario; and the latter reports to the Lieutenant-Governor of Ontario.

The general administrative policy of the Canadian Commissioners has been much the same as that of the

New York State Commissioners. Both have addressed themselves assiduously to the task of restoration and preservation. To be sure, there have been a good many differences in matters of detail. This has been inevitable, for conditions and circumstances are by no means the same on the two sides of the river. The Canadian Commissioners have not adhered so strictly to the policy of "naturalness" as have the Americans. The gorgeously beautiful flower-beds of the Canadian park, for instance, would be altogether out of place in the American scheme. The Canadians have not been content, as have the Americans, with the native growths, but have planted all sorts of specimen plants and trees, the idea apparently being to get as many varieties as possible. That they have been eminently successful in this is evidenced by the showing of their greenhouse at various exhibits and by the extensive herbarium in the office of the superintendent.

The whole Canadian park system is on so much larger a scale than the American Reservation that different treatment is almost unavoidable. For one thing, the topography is quite different, and admits of different treatment. We cannot do better in this connection than quote from the report made to the New York State Commissioners by Messrs. Frederick Law Olmsted and Calvert Vaux in 1887. Says Mr. Olmsted:

"In certain respects the New York State Reservation has advantages over that of the Province of Ontario. There are greater beauties of a kind depending on refinement and delicacy, subtle qualities and natural elements of scenery largely apart from the cataract; greater beauties of the kind in which the nearness to the eye of illumined spray and the mist and fleeting waters, intricate disposition of leaves, with varied play of light and shadow, refractions and reflections and much else undefinable in conditions of water, air and foliage are undefinable parts. . . .

“The topography of the Ontario Reservation is so large in scale, and the interest of what is to be seen from it is so independent of all such details as contribute to make the charm of the New York part of the scheme, that even the broad military road that follows the brink of the Canadian cliff, strikes the eye as only an insignificant circumstance. In respect to grandeur of the scenery nothing can be offered on the New York side to compare with what is now to be had, even before any improvements are made, at any point upon a line nearly a mile in length on the heights of Ontario.”<sup>4</sup>

Not only is the topography on a larger scale, the whole park project is on much larger lines. The very fact that the original Canadian Reservation has become part of an extensive park system makes quite different treatment inevitable; the parts are naturally treated with regard to the whole. The idea on the Canadian side is to connect the various park areas with a great lake to lake boulevard, following the course of the Niagara river. It is a most imposing plan and one that demands bold treatment.

There are other reasons why the general policy on the Canadian side has necessarily been different from that on the American Reservation. In Ontario the railway stations, hotels, and restaurants are at a much greater distance from the park than they are in New York. It is consequently necessary to make much more complete provision for visitors on the Canadian side than on the American side. Thus it happens that, while sales of all kinds are strictly prohibited on the New York State Reservation, the Canadian Commissioners have from the

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<sup>4</sup> Supplemental Report of the Commissioners of the State Reservation, 1887, p. 27.

beginning maintained a restaurant not so much as a means of revenue as a matter of convenience.

The policy of the Commissioners in its physical aspects is perhaps best summed up in their own words in their twenty-third annual report. We quote:

“The Commissioners think that this great Park and Boulevard system should not only be used for the recreation and enjoyment of the public, but should also be utilized during its formative period, and for all time to come, as a Provincial School of Practical Forestry, Horticulture, Floriculture, and Botany, and last, but not least, an object lesson in good road building.”<sup>5</sup>

The financial policy of the Commissioners has been no less interesting than the physical administration of the park. The general principles which determined the financial policy of the Commissioners were established when the park scheme was first seriously discussed. It was regarded as an indispensable condition for the establishment of a reservation (1) that there should be no permanent financial burden upon the Province, but that the park should, as soon as possible, become self-supporting; (2) that the Canadian park should, as far as possible, be as free to the public as the corresponding reservation on the American side.

The preparation of measures to give effect to these general principles was no small task. The problem occupied the most serious attention of the Commissioners from the very outset. It was hoped at first that tolls for the use of various artificial constructions and appliances or for the services of guides would prove sufficient for the purposes of the park. This scheme proved so inadequate

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<sup>5</sup> Annual Report of the Commissioners of the Queen Victoria Niagara Falls Park, XXIII, p. 10.

that it was very soon abandoned. It was soon evident that more drastic measures would have to be taken if the Province was to be spared the burden of the park. The first resource hit upon was the building of an electric railway along the river. This was desirable not merely as a source of revenue but for convenience of transportation through the park. The bank of the river was accordingly surveyed and the right of way secured. Under the terms of the agreement with the railway company the Commissioners furnish all the water power necessary for the development of the electricity necessary to operate the line, while the company on its part pays an annual rental of \$10,000.

For the first seven years of its administration the Commission had to rely entirely on the revenues obtained from the franchise just mentioned and what could be obtained by leasing such privileges as the elevator and scenic tunnel under the Falls, the restaurant, photographic and wharf privileges. As pointed out in the last annual report of the Commissioners:

“The very meager revenues obtained from these sources were not only insufficient for the ordinary maintenance of the Park as then constituted, but were entirely inadequate for the payment of the interest on the bond issue and the setting apart of a sinking fund. It will be obvious, therefore, that under these adverse financial conditions no well conceived plan for the restoration and improvement of such an extensive and varied park system could be undertaken on a broad and comprehensive scale until funds could be assured for the proper and effective carrying on of such work. Scenic decoration was therefore confined to the portion of the park overlooking the Falls. This condition of affairs grew worse rather than better as time passed, for the up-

keep of the restored portion of the Park demanded increased expenditures, and the large number of visitors necessitated police supervision and an increased number of permanent and temporary officials for ordinary care and management.”<sup>6</sup>

It was not until 1892 that the financial situation was relieved. In that year the sanction of the government was finally obtained to the granting of a franchise for the use of a portion of the enormous water power of the Falls for commercial purposes. A contract was at once entered into with the Canadian Niagara Power Company.<sup>\*</sup> The privileges granted proved objectionable on account of their monopolistic character and were accordingly abandoned for a new contract in 1899. Since then two other franchise grants have been made, one to the Ontario Power Company in 1900 and one to the Electrical Development Company in 1903. By these means an assured income has been obtained for carrying on the work of expanding and developing the park system. Every precaution has been taken in the agreements to conserve as perfectly as possible the natural features of the park. To this end the companies are required to submit all construction plans to the Commissioners for approval. The agreements themselves must be approved by the Lieutenant-Governor in Council and must be ratified and confirmed by the Assembly.

The financial arrangements are similar in the three cases. The Canadian Niagara and the Electrical Development Company each pay an annual rental of \$15,000 for the generation of 10,000 horse-power. After that they pay a fixed sum per horse-power; one dollar per annum for every horse-power between 10,000 and 20,000;

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<sup>\*</sup> Annual Reports of the Commissioners of Queen Victoria Niagara Falls Park, XXVII, p. 11.

seventy-five cents for every horse-power between 20,000 and 30,000; and fifty cents for every horse-power over 30,000. The Ontario Power Company pays \$30,000 for 20,000 horse-power or less; one dollar for all between 20,000 and 30,000; seventy-five cents for all between 30,000 and 40,000; and fifty cents for all over 40,000. In 1912 these companies paid a total of \$134,210.41. The total revenue from all sources for the same period was \$195,848.93.

The grants made to the various power companies have been carefully limited. The Ontario Power Company may withdraw from the river a quantity of water equivalent to the volume that will pass through three pipes each eighteen feet in diameter. The Canadian Niagara and the Electrical Development Company are limited to a diversion sufficient to produce respectively 75,000 and 96,000 horse-power. The period for which the privileges in question are granted is in each case fifty years with an option of three renewals of twenty years each, the rentals to be adjusted at the time of each renewal, if the Lieutenant-Governor in Council so desires, and at the end of the third renewal the Lieutenant-Governor in Council may require a still further renewal of twenty years; the entire period thus covered by the agreement being 130 years. Half the power generated is reserved for home consumption and exportation is regulated by the granting of revocable licenses of short duration.

The Canadian Commissioners have been much criticized for granting power privileges within their park limits. In this connection it is only fair to remember the financial situation on the Canadian side. Apart from a bond issue of \$900,000, guaranteed by the Province of Ontario, the proceeds of which were used exclusively for capital expenditures, no legislative grant has ever been made either for permanent improvements or for maintenance. It was only after other expedients had failed that



recourse was had to the objectionable power concessions. In answer to the charge that, in granting the power privileges, the scenery of the Falls has been sacrificed, the Commissioners point out that, with the exception of the Ontario Power Company's plant in the gorge below the Falls, all the power works which have been permitted are practically beyond the territory originally designed for park purposes. Had the property not been expropriated when the park was established, the lands would no doubt have been acquired for manufacturing purposes, and altogether without regard to scenic consideration. The attitude of the Commissioners is best stated in their own words. We quote:

"All the works and structures connected with the electrical power projects have been designed with the object not only of doing the least possible injury to scenic conditions, but the Commissioners are confident in the belief that when several works are completed, the concensus of opinion by the vastly increased number of visitors that are expected to visit the Park will abundantly sustain them in their contention that the park as a whole, with its wealth of electrical machinery, will then be of ten-fold greater interest to the great majority visiting it; and in addition not only will the immediate locality beyond the Park be built up into one of the great manufacturing centers of the world, but the quickening impulse and vivifying effects of the world's latest and most perfect form of energy — created and sent forth by the Falls of Niagara — will be felt from end to end of the Province."

The Canadian Park has been an object lesson in businesslike, efficient and progressive park management. Not only have the Commissioners admirably met each new

problem as it has arisen, but they have not hesitated to suggest new departures. The achievements within the various park areas, the electric railway project, the power development management, the boulevard plan, a more recent suggestion that the government, in the interests of scenic preservation, vest in the Commissioners portions of the foreshore for a certain distance where it seems probable that this will be occupied for manufacturing purposes — all these activities bear witness to the character of the Commission's management.

## CHAPTER XI

### CONCLUSION

After having read a story of achievement such as that which has been detailed in the foregoing pages, at least two questions inevitably come to mind. In the first place, one can hardly help asking whether the effort put forth has, after all, been worth while. In other words, we ask ourselves, has the work of the past justified itself in the present? And this is no sooner answered than we turn our faces the other way and ask what it is that the future has to offer. It is very natural, after having read what has been accomplished, to ask what there is still to be done, and what likelihood there is that it will be done. So a brief discussion of these questions may be in order.

It is more than a third of a century — nearly the length of an average human life — since public sentiment began to call for the reclamation of Niagara Falls from a condition which had become a reproach to the State. In the preceding pages we have described something of the strenuous campaign which was necessary to secure legislation authorizing the preservation of the natural scenery of Niagara for the benefit of the people, the long hard tug of war to secure the appropriation for its purchase, the perennial struggle to get adequate appropriations for the work of rehabilitation and maintenance, the watchful care exercised to prevent commercial intrusion, and the hard fought fight to preserve the integrity of the Falls themselves.

It is impossible to say how much money, time, and energy the preservation of Niagara Falls has cost the nation these last thirty years. Mere figures cannot measure the price. In the previous pages we have tabulated the sums expended by the State; but these do not

take into account the many thousands of dollars spent by the original Niagara Falls Association in the campaign which culminated in the creation of the Reservation at Niagara; nor do they include the money spent by individual commissioners of the Reservation since its establishment and by organized bodies like the American Scenic and Historic Preservation Society, the American Civic Association, commercial associations, and other bodies in their vigorous defense of the Falls, to say nothing of the countless private citizens who have joined in the work.

Was it, is it, worth while? Worth while to spend so much money for the preservation of a waterfall? Worth while for the members of the Niagara Commission — all men of extensive affairs and pressing responsibilities in other directions — to give gratuitously to the defense and administration of the Reservation, time and attention which might otherwise be employed to their personal advantage? The answer is an unqualified affirmative. The reasons are not far to seek.

In the first place, all these sacrifices of time and money by the Commissioners and the army of citizens who have co-operated with them, have been made in response to a natural and irrepressible human instinct of the highest order, the love of the sublime and the beautiful for its own sake. Most convincing proof of this is the fact that over a million and a quarter persons go to the Falls annually — not as they go to a great city to visit museums and art galleries; not as they go to the mountains or to the seashore, to recuperate their health; not as they go to the cities and storied ruins of the old world; but simply to see the wonderful downpouring of waters which constitutes the grandeur of Niagara. The very simplicity of the fact is eloquent. That the Falls have the power to attract more than a million persons a year, not because they supply anything to educate the intellect, but just

because they appeal to the human soul in a manner which, while it cannot be described, can never be forgotten — this alone is a sufficient justification for all the labor and pain and sacrifice that have gone into the making of the State Reservation at Niagara and the preservation of the integrity of the Falls.

Another evidence of the "value" of the expenditure of money and labor in the interests of Niagara is to be found in the very character of the work that has been done. It has been educational work in the highest sense of that term, for it has involved not merely the establishment of an entirely new principle in the United States but the development of a sentiment as well. Certainly, if it was worth while to blaze the way in the matter of the public preservation of scenic beauty, as the State of New York did in the establishment of the Niagara Reservation, it was even more worth while to arouse and educate public sentiment up to its present lively appreciation of that beauty. This is exactly what the fight for the preservation of Niagara Falls has very largely helped to do. How universal the appeal of Niagara is, is evidenced by the fact that never, since the establishment of the Reservation, has the expenditure made by the State been criticised. In fact, the creation of the Niagara Reservation was undoubtedly one of the most popular things the Legislature of the State of New York ever did.

The third answer to the question as to the "value" of past endeavors to protect Niagara is found in the universal uprising of sentiment against the depletion of Niagara among all classes except the commercial interests which would derive pecuniary gain from the impairment of the Falls. This evidence is entirely different from that which has thus far been adduced. The absence of protests against the expenditure of money might proceed from indifference and, in a sense, is a negative argument; but the open and vigorous protest against the depletion

of the Falls is an active and positive argument. The attendance of so many visitors a year might be explained on the ground of a certain degree of self-interest or self-gratification — albeit of a very high order; but the outcry of people throughout the whole land, the majority of whom never saw, and, in all probability, never will have the indescribable pleasure of seeing, Niagara Falls, is entirely distinct testimony to the popular appreciation of the unique value of the great scene as a national possession.

To the satisfaction that comes from the consciousness of work well done and well approved may, in this case, be added the satisfaction arising out of the very importance of the trust imposed. The Commissioners of the State Reservation at Niagara, as servants of the people of New York, are trustees not merely for New York and the United States but for all mankind. The realization of the extent of this trusteeship was very forcibly impressed upon the author by an incident which occurred when the Imperial Chinese High Commissioner, the Viceroy, Tuan Fang, visited the Falls several years ago. The distinguished oriental statesman viewed the various scenes about the Falls with apparent interest, but for some time with no more evidence of enthusiasm than courtesy might dictate. When, however, he came to the head of the Second Sister Island which commands a sweeping view of the tumultuous rapids above the Horseshoe Fall, his stoical reserve vanished. His emotions seemed to overpower him. He shook his own hands, raised himself several times on tiptoe, all the while uttering exclamations of the greatest delight. Asked later to write his name and a sentiment in a visitors' book, he wrote in ancient classical characters, "This is the most beautiful water landscape under the heavens."

When we compare this with the similar expression of the distinguished American author, Henry James, who

said, "You stand steeped in long looks at the most beautiful object in the world;" and with the remark of another equally distinguished American author, Charles Dudley Warner, who said: "The walk about Goat Island at Niagara Falls is probably unsurpassed in the world for wonder and beauty," we realize that Niagara appeals to something which exists universally in the human breast and that it speaks in a language equally understood by all peoples.

Though the past has contributed much, it must not be supposed that the good work is completed. It is true, the principle of the public preservation of scenic beauty has been permanently established, public opinion has been quickened and elevated, and many permanent improvements of a more material character achieved; but there is, nevertheless, still a great deal to do. On the Reservation itself the work of preservation and maintenance must always go on while beyond the Reservation there is still a large field for endeavor. Only when the last untidy factory site has been harmonized with its natural setting, and every power interest has been brought to restrain itself that Niagara may be preserved, when the "Reservation idea" has been extended to include all the beauties of the Niagara river, will the work even approach completion.

It is, of course, vain to forecast the future and we shall not attempt it. It is sufficient for our purposes to point out hopeful beginnings which have been made. Preservation of the Falls is assured to the extent of the provision made by the treaty with Great Britain. The work of restoring the disfiguring sites held by the manufacturing interests along the river has also been begun.

All plans for further action are interesting chiefly for the eloquent testimony which they bear to the virility of the Niagara preservation idea which was first effectively voiced thirty years ago in the establishment of

the State Reservation at Niagara. In the persistence of that idea rather than in any particular scheme, State or national, lies the hope of the future. The State Reservation at Niagara will have amply justified its continued existence and total cost, in whatever terms that cost may be measured, if it contributes ever so slightly to keep alive this Niagara sentiment, and serves as an exemplar of what disinterested and efficient public service and consistent and unselfish devotion to an ideal can bring to pass.













